Supreme Court, U.S.
FILED
MAY 19 1992
OFFICE OF THE CLERK

NO. 91-1859

In the Supreme Court of the United States

OCTOBER TERM, 1991

INDUSTRIAL HELICOPTERS, INC.
Defendant-Petitioner

VERSUS

MICHAEL J. GREEN
Plaintiff-Respondent

UNITED STATES FIDELITY & GUARANTY COMPANY
Plaintiff-intervenor/ Respondent

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

CHARLES R. SONNIER #12260
SONNIER, HEBERT & HEBERT
Two South Magdalen Square
P. O. Drawer 700
Abbeville, La 70511-0700
(318) 893-5973
ATTORNEYS FOR
INDUSTRIAL HELICOPTERS, INC.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED FOR REVIEW

1. Whether Louisiana can create a new maritime cause of action.

PARTIES TO THE PROCEEDING BELOW

All parties to the proceeding below appear in the style of this case. There are no parent or subsidiary companies to be listed pursuant to S.Ct. R. P. 29.1.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING BELOW ii

TABLE OF CONTENTS ..... iii-v

TABLE OF AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI 1

REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS 1

STATEMENT OF GROUNDS OF JURISDICTION 2

STATUTE INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR ALLOWING THE WRIT 7

The Louisiana Supreme Court's Analysis 9

Helicopters and Vessel Passengers 11

A Limited Application? 13

State Interest Versus Federal Interests 14

Savings to Suitors 16

CONCLUSION 17

CERTIFICATE OF SERVICE 18

APPENDICES

APPENDIX A: Opinion of Louisiana Supreme Court and Denial of Rehearing (in globo) A-1

APPENDIX B: Application for Rehearing by Industrial Helicopters to Louisiana Supreme Court A-25

APPENDIX C: Post Argument Brief of Industrial Helicopters to Louisiana Supreme Court A-34

TABLE OF CONTENTS (continued)

		Page
APPENDIX D:	Ruling of Louisiana Supreme Court granting Writs of Certiorari of Michael Green and USF&G	A-40
APPENDIX E:	Opposition by Industrial Helicopters to Application for Writs of Certiorari to Louisiana Supreme Court by Michael Green and USF&G, Plaintiff and Intervenor	A-43
APPENDIX F:	Opinion of Third Circuit Court of Appeal on remand from the Louisiana Supreme Court	A-68
APPENDIX G:	Ruling of Louisiana Supreme Court granting Writ of Certiorari of Industrial Helicopters including concurring opinion of Honorable Justice Watson	A-75
APPENDIX H:	Application for Writ of Certiorari by Industrial Helicopters to Louisiana Supreme Court	A-79
APPENDIX I:	Denial of Rehearing Application to Court of Appeal, Third Circuit, State of Louisiana	A-113
APPENDIX J:	*Duhon v. Petroleum Helicopters, Inc.*, 554 So.2d 1270 (La. App. 3rd Cir., 1989) rehearing denied, writ denied	A-115

TABLE OF CONTENTS (continued)

		Page
APPENDIX K:	Application for Rehearing by Industrial Helicopters to Court of Appeal, Third Circuit, State of Louisiana	A-140
APPENDIX L:	Opinion of Court of Appeal, Third Circuit, State of Louisiana	A-150
APPENDIX M:	Judgment of Trial Court	A-163
APPENDIX N:	Opinion of Trial Court (Honorable Judge Don Aaron, Jr.)	A-166

TABLE OF AUTHORITIES

CASES **Page**

Askew v. American Waterways Operator, Inc., 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed.2d 280, (1973) . . . 9,10

Barger v. Petroleum Helicopters, Inc., 692 F.2d 337 (5th Cir. 1982) 12

Charles Barnes Co. v. One Dredge Boat, 169 Fed 895 (E.D..Ky. 1909) 12

Dardar v. Louisiana State Dep't of Highways, 447 F.2d 952 (5th Cir. 1971), rehearing denied 405 U.S. 1048, 92 S.Ct. 1308, 31 L.Ed.2d 591 (1972) 12

Duhon v. Petroleum Helicopters, Inc., 554 So.2d 1270 (La. App.3rd Cir., 1989) writ denied 559 So.2d 1360 (La. 1990) 5,6,11

Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 93 S.Ct 493, 34 L.Ed.2d 454 (1972) 12,13

Green v. Industrial Helicopters,
593 So.2d 634 (La. 1991) 1,7-8,10,11,14,17
576 So.2d 1183 (La.App.3d Cir. 1991)(en banc) 2
560 So.2d 684 (La.App.3d Cir. 1990) 2,5,6

Hebert v. Air Logistics, Inc., 720 F.2d 853 (5th Cir. 1983) 12

Miles v. Apex Marine Coropration, 111 S.Ct. 317 (1990) 14,15

TABLE OF AUTHORITIES (continued)

CASES **Page**

Reeves v. Offshore Logistics, Inc., 720 F.2d 835, (5th Cir. 1983) 12

Smith v. Pan Air Corp., 684 F.2d 1102 (5th Cir. 1982) 12

Offshore Logistics Inc. v. Tallentire, 477 U.S. 207, 106 S.Ct 2485, 91 L.Ed.2d 174 (1986) 10,12,15,16

The Osceola, 189 U.S. 158 (1903) 15

Thomas v. B.J. Titan Services Co., (1992 WL 47798) (La.App. 4th Cir. 3/17/92) 14

Wendt v. General Dynamics Corp., 1979 AMC 2897 (D.N.J. 1978) 12

STATUTES

28 USC 1257(a) 2

43 USC 1331, et seq (Outer Continental Shelf Lands Act) (OCSLA) 7,10

Judiciary Act of 1789 16

Louisiana Civil Code Article 2315 3

Louisiana Civil Code Article 2317 3,4,5,6,7,8,9,10,11,13

U.S. Supreme Court Rule 10.1(b) and (c) 2

TREATISES

T. Schoenbaum, *Admiralty and Maritime Law*, § 3-6 at 81 (1987) 12,13

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

INDUSTRIAL HELICOPTERS, INC.
Defendant-Petitioner

VERSUS

MICHAEL J. GREEN
Plaintiff-Respondent

UNITED STATES FIDELITY
& GUARANTY COMPANY
Plaintiff-intervenor/
Respondent

PETITION FOR WRIT OF CERTIORARI

Industrial Helicopters, Inc. files this petition for a writ of certiorari to review the judgment and opinion of the Louisiana Supreme Court for the reasons listed herein.

REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

The Louisiana Supreme Court decision of this case rendered January 17, 1992 is found at 593 So.2d 634 (La. 1992) (APPENDIX A). The denial of rehearing, which made the Louisiana Supreme Court opinion final, was issued February 20, 1992 and is reported at 593 So.2d 634 (La. 1992) (APPENDIX A).

The Louisiana Third Circuit Court of Appeal deci-

sion, *en banc* is reported at 576 So.2d 1183 (La. App. 3rd Cir. 1991). (APPENDIX F). The original Louisiana Third Circuit Court of Appeal decision is found at 560 So.2d 684 (La. App. 3rd Cir. 1990) (APPENDIX L).

The trial court decision of the Fifteenth Judicial District, State of Louisiana is an unreported decision but is attached as APPENDIX M.

STATEMENT OF GROUNDS OF JURISDICTION

The United States Supreme Court has jurisdiction to review the January 17, 1992 Louisiana Supreme Court decision and its order denying rehearing issued February 20, 1992 under authority of 28 USC § 1257(a) which specifically provides for jurisdiction over "final judgments or decrees rendered by the highest court of a state in which a decision could be had . . . where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the laws of the United States."

Additionally, U.S. Supreme Court Rule 10.1(b) and (c) provides for consideration of petitions for writs of certiorari to the Supreme Court as follows:

> "When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals." Rule 10.1(b)
>
> and
>
> When a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." Rule 10.1(c)

STATUTE INVOLVED

The state statute involved in these proceedings is the Louisiana strict custodial liability law found in Louisiana Civil Code Article 2317:

> **"Acts of others and of things in custody**
>
> We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custory...."

STATEMENT OF THE CASE

Michael Green filed suit against Industrial Helicopters and its pilot, Doug Wright, seeking personal injury damages. The suit was filed in the Fifteenth Judicial District Court, Parish of Lafayette, Louisiana. The petition alleges that Green was employed by Southern Petroleum Laboratories, Inc. (SPL) which had engaged the services of Industrial Helicopters "as an air taxi for transportation from Milton, Louisiana, to Aminoil platform at High Island 561 and High Island 309", approximately 90 miles offshore. Green claimed pilot negligence and maintenance negligence of Industrial Helicopters under Louisiana Civil Code Article 2315. He also claimed that Industrial Helicopters was responsible on the basis of strict liability for the defects existing in the helicopter pursuant to Louisiana Civil Code Article 2317 and "*other applicable Federal or Louisiana statutes*".

United States Fidelity and Guaranty Company (USF&G) provided worker's compensation insurance for SPL. USF&G intervened seeking reimbursement for

medical payments and worker's compensation paid under the Federal Longshoreman's and Harbor Worker's Act (LHWCA).

The following facts are pertinent to this cause. Green was employed by SPL as a gas meter instrument technician and was riding as a passenger in the helicopter. Suddenly and with very little warning, the helicopter lost engine power, caused by mechanical failure of the helicopter's governor mechanism. During the descent into the Gulf, the pilot had ample opportunity to instruct Green to prepare for the landing on the water and the pilot maneuvered the helicopter so that it landed softly on its pontoons. Exxon personnel dispatched a rescue capsule from an adjacent oil platform to the floating but disabled helicopter. Green claimed his injuries occurred either in the rescue operations or as a result of the helicopter's alleged impact on the water.

The trial judge specifically found that neither Industrial Helicopters nor its pilot was liable under any theory of negligence. The pilot's "handling of this emergency situation was extraordinary". *Green*, Trial Court Opinion (Appendix N, p. A-168). He also found that Industrial Helicopters was not negligent in the maintenance or inspection of its helicopters and that it was not possible for Industrial Helicopters to have discovered the defective governor. The manufacturer of the governor mechanism, (the sealed unit which controlled the engine fuel and caused the accident) was not included as a party by Green. Industrial Helicopters was nonetheless held liable for any damages caused by the defective thing in its care, custody or control under Louisiana Civil Code Article 2317 (APPENDIX N).

Green and USF&G appealed seeking additional damages. Industrial Helicopters answered the appeal. The Third Circuit Court of Appeal, State of Louisiana, affirmed and amended the Trial Court's decision (APPENDIX L). The Appellate Court agreed with the Trial Court's exculpation of Industrial Helicopters and its pilot from any liability under negligence. The Appellate Court found, however, that since the helicopter was in the custody of Industrial Helicopters it was strictly liable to plaintiff based on plaintiff's proof of a defect in the helicopter which created an unreasonable risk of harm to petitioner, Michael Green. The Appeal Court confirmed the application of strict liability under Louisiana Civil Code Article 2317.

Industrial Helicopters applied for a rehearing calling the Court's attention to a recently rendered decision out of the same Parish and State Judicial District, which was appealed and argued before a different panel of the same Third Circuit Court (APPENDIX K). In *Duhon v. Petroleum Helicopters, Inc.*, 554 So.2d 1270 (La. App. 3rd Cir., 1989) rehearing denied, writ denied, the Third Circuit Court, State of Louisiana found Louisiana Civil Code Article 2317 inapplicable to a helicopter owner under similar facts (APPENDIX J). After rehearing was denied by the Third Circuit Court, Industrial Helicopters sought a writ of certiorari to review the decision of the Court of Appeals with the Louisiana Supreme Court (APPENDIX H). On October 19, 1990, the Louisiana Supreme Court granted the writ of certiorari and remanded the *Green* case to the Third Circuit Court of Appeal ordering an en banc hearing to determine whether the *Green* decision was in conflict with the *Duhon* decision, supra, and if so to determine which view was correct (APPENDIX G). On remand, a majority of the Third Circuit appellate court affirmed the *Duhon* case and reversed *Green* thereby upholding the proposition that Louisiana Civil Code Article 2317 was not available to a plaintiff filing suit in State Court under the

"savings to suitors" clause since it conflicted with the maritime or admiralty law which establishes the substantive rights of parties in such an accident on the high seas (APPENDIX F).

Although the Louisiana Supreme Court previously denied writs in the *Duhon* case, which considered the question of strict liability being applicable in such a situation, a writ of certiorari was granted to the plaintiff, Green, and intervenor, USF&G. On January 17, 1992, Chief Justice Pascal Calogero, writing for a unanimous Louisiana Supreme Court held that;

> ..."there is no applicable contrary federal legislation and that La. C.C. art. 2317 neither prejudices the characteristic features of the general maritime law nor interferes impermissibly with any required uniformity in such law", (APPENDIX A, p. A-20)

and therefore applied Louisiana Civil Code Article 2317 (strict custodial liability) to this accident. The Louisiana Supreme Court overruled the previous decision of *Duhon v. Petroleum Helicopters, Inc.*, 554 So.2d 1270 (La. App. 3rd Cir., 1989) writ denied 559 So.2d 1360 (La. 1990) (APPENDIX A). The effect of this decision was to reinstate the *Green* judgment of the Third Circuit Court of Appeals dated April 18, 1990 found at 560 So.2d 684 (La. App. 3rd Cir. 1990). Industrial Helicopters' application for rehearing was denied (APPENDIX A & B). This petition for certiorari seeks review and reversal of the Louisiana Supreme Court decision.

REASONS FOR ALLOWING THE WRIT

WHETHER LOUISIANA CAN CREATE A NEW FEDERAL MARITIME CAUSE OF ACTION.

The imposition of Louisiana Civil Code Article 2317, strict custodial liability, for injuries sustained by non-seaman on the high seas creates a new federal maritime cause of action. In doing so the Louisiana Supreme Court created a special pigeon hole for claims of passengers who were injured on the high seas in accidents involving aircraft.

This holding, if allowed to stand, will create havoc in the maritime personal injury law of the United States. Such claims of non-seaman passengers injured in offshore waters, beyond a state's territorial limits and not subject to the Outer Continental Shelf Lands Act (OCSLA) (43 USC 1331, et seq.), would be controlled by various laws without uniformity. Each adjacent state's law would apply to its citizens depending on the fortuitous event of the site of the accident. General Maritime Law has always been opposed to any such operation of law and this decision now sets these possibilities in motion.

The Louisiana Supreme Court apparently recognized its venture when it made the following statement:

> "The question whether La.C.C. art. 2317 applies under these circumstances is a *res nova* issue in this court. Nor has the U.S. Supreme Court directly addressed whether strict custodial liability may be part of the general maritime law, nor expressly authorized Louisiana's supplementation in that fashion for cases properly within Louisiana courts' jurisdiction and tried in those courts." *Green v. Industrial Helicopters*, 593

So.2d 634 (La. 1991) at p. 637 (APPENDIX A, p. A-5) (Emphasis added)

The foregoing analysis by the Louisiana Supreme Court demonstrates the necessity for this Honorable Court to seriously consider this writ application. Regardless of the unlikely acceptance of the theory that Louisiana's strict liability law is merely ancillary to the general maritime law, the proper forum for that ultimate decision is the Supreme Court or the Congress of the United States. Petitioner is quick to urge however, that this Court's sensitivity and protection of uniformity would dictate repudiation of such a proposal. While Louisiana or any other state is free to adopt remedies and implement them, these remedies cannot make changes in substantive maritime law. This was also recognized by the Louisiana Supreme Court when it made this observation:

> "As a matter of logic and legally permissible principle, Louisiana may afford a remedy not traditionally found in the maritime law, provided that the remedy neither conflicts with substantive maritime law nor impermissibly *interferes with the requirement of uniformity.*" *Green,* supra at p. 639 (APPENDIX A, p. A-8) (emphasis added).

Ironically this "logic and legally permissible principle" was spurned by the Louisiana court relying on its conclusion that "in this setting" strict liability does not defeat the purpose of any specific Congressional pronouncement. The Court also held that Article 2317 does not create a material prejudice to the characteristic features of maritime law and does not interfere with the uniformity of that law in international and interstate relations. Yet, if the Court relied on "logic and legally permissible principle[s]", they should not have disregarded the fact that each

sovereign state bordering an oceanic body could conceivably create different and diverse bodies of admiralty tort law. Certainly this would directly inhibit and jeopardize the uniformity and tranquility of international and interstate relations as it relates to maritime law. This is not a desirable consequence.

THE LOUISIANA SUPREME COURT'S ANALYSIS

The Louisiana Supreme Court continued its analysis of the application of strict custodial liability law by determining whether there is applicable federal legislation identifying the "characteristic features of maritime law" and by examining the "scope of the uniformity requirement." Under this first step, the Court cites as one example for Article 2317 applicability, *Askew v. American Waterways Operatior, Inc.*, 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed.2d 280, (1973). However, that case is distinguishable from the case at bar. *Askew* involved an injnunctive action brought by several shipping associations, the Florida Coastal Barge and Towing Industry and other owners and operators of oil terminal facilities located in Florida. The parties sought to enjoin the application of the Florida Oil Spill Prevention and Pollution Control Act, stating that the Water Quality Improvement Act, enacted by Congress in 1970, preempted the Florida statute. The state statute imposed strict liability for damages as a result of an oil spill in the state's territorial waters despite the existence of a pervasive system of federal control governing oil spills. Under the federal statute the state had *no* remedy for recovery. The federal statute provided a method for repayment of costs to the U. S. Government *only*. The Florida statute provided the state with the same remedy of repayment, but, allowed it to recover damages for destruction to its coastal wetlands. Further, the federal act specifically *allowed* supplementation by state regulations. Therefore,

the *Askew* case differs greatly from the case at bar in that the federal admiralty tort law provides Michael Green a remedy for recovery of damages, thus negating the need for supplemental state law.

Still under the first prong of the analysis, the Court cites, as the only possible statutory provision applicable which allows supplemental state law, the Outer Continental Shelf Lands Act (OCSLA), supra. The ultimate test in determining whether the OCSLA is applicable, is the "situs" analysis. This situs inquiry is the requisite foundation in all cases for determining the applicability of federal admiralty tort law. However, after a correct analysis, the Court concluded that the OCSLA is not applicable in *Green* by a factual analogy to *Offshore Logistics Inc. v. Tallentire,* 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986). The Louisiana Court then determined that since there is no federal statute applicable, the focus should turn to the federal general maritime law to see if La. C.C. Article 2317 would materially prejudice the "characteristic features of maritime law."

During this examination of the various remedies provided by the general maritime law, the Louisiana court reviewed the traditional means of reparation. It concluded that the time-honored and sanctioned methods of recovery allowed under general maritime law depended upon a person's classification as "a seaman, a non-seaman maritime worker, or a nonmaritime worker." *Green* supra, at p. 640 (APPENDIX A, p. A-11). There is nothing erroneous about that observation. Again however, after a seemingly thoughtful analysis, the Louisiana court fell off the ledge. Without any legal authoritative basis and while at the same time recalling the conflicts argument as having some appeal, the Court nevertheless stated that, under the circumstances of this case, the general maritime law, which

requires proof of negligence, authorizes application of state law strict liability. *Green* supra at p. 641, (APPENDIX A, p. A-13). We submit this assessment to be patently erroneous.

In *Green*, supra, the Louisiana high court reversed its previous consideration of this question when it had denied writs of review in a matter entitled *Duhon v. Petroleum Helicopters, Inc.*, 554 So.2d 1270 (La. App. 3rd Cir. 1989) writ denied, 559 So.2d 1360 (La. 1990) (APPENDIX J). The Louisiana third circuit appellate court recognized that there was no implied warranty of seaworthiness extended to passengers and pointedly concluded:

> "Since the general maritime tort law requires proof of negligence by a passenger who sues a common carrier, and La. C.C. art. 2317 does not require proof of negligence, *there is a substantive conflict* affecting the rights of the parties, and the maritime law must prevail." *Duhon v. Petroleum Helicopters, Inc.*, supra, p. 1277 (APPENDIX J, p. A-129) (emphasis added)

The above cited *Duhon* decision is specifically overruled by the action of the Louisiana Supreme Court in *Green*.

HELICOPTERS AND VESSEL PASSENGERS

The Court attempts to distinguish this case from other traditional maritime matters by concluding that helicopters are not to be considered vessels since they do not "cope with the hazards of the sea", *Green*, supra, at p. 641 (APPENDIX A, p. A-14). However, a review of the Court's analysis, in light of previously considered authorities and the parallel legal consequences, reveals that distinction to be meritless.

The most basic criterion used to decide the identity of a vessel is whether the purpose for which it is constructed and the business for which it is engaged bears any connexity to traditional maritime activity. T. Schoenbaum, *Admiralty and Maritime Law,* § 3-6 at 81 (1987) (hereinafter, Schoenbaum). A large navigation buoy designed to be towed from place to place was held to be a vessel. *Charles Barnes Co. v. One Dredge Boat,* 169 Fed 895 (E.D.Ky. 1909), *Wendt v. General Dynamics Corp.,* 1979 AMC 2897 (D.N.J. 1978). Additionally, in *Dardar v. Louisiana State Dep't of Highways,* 447 F.2d 952 (5th Cir. 1971), rehearing denied 405 U.S. 1048, 92 S.Ct. 1308, 31 L.Ed.2d 591 (1972), a car shuttle ferry permanently anchored to shore was found to be a vessel. Granted, aircraft, helicopters and seaplanes are not ordinarily classified as vessels because their purpose is to fly through the air, not to navigate on water. Schoenbaum, supra. However, a seaplane that is navigating on the water may be a vessel. *Barger v. Petroleum Helicopters, Inc.* 692 F.2d 337 (5th Cir.1982), rehearing denied 698 F.2d 1216 (5th Cir.1983); *Smith v. Pan Air Corp.* 684 F.2d 1102 (5th Cir. 1982); *Hebert v. Air Logistics, Inc.* 720 F.2d 853 (5th Cir. 1983); *Reeves v. Offshore Logistics, Inc.* 720 F.2d 835, 1984 AMC 2552 (5th Cir. 1983).

The issue of whether an aircraft is considered a vessel for admiralty purposes was first addressed in the case of *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). The *Executive Jet* court held that the function of the aircraft must possess "maritime flavor" in order for the aircraft to be declared a vessel for admiralty purposes. In *Offshore Logistics Inc. v. Tallentire,* 477 U.S. 207, 106 S.Ct 2485, 91 L.Ed.2d 174 (1986), this Court held that a helicopter crash, in waters approximately 35 miles off the coast of Louisiana, invoked admiralty jurisdiction. The *Tallentire* court

concluded that a helicopter, although not a traditional maritime conveyance, when used to ferry passengers from an island to shore is engaged in a function traditionally performed by vessels. This is sufficient to satisfy the "maritime flavor" requirement enunciated in *Executive Jet.*

By ferrying offshore workers to artificial islands, the function of the Industrial helicopter in this case bears a significant resemblance to a vessel in performing a duty traditionally undertaken by watercrafts. (Hypothetically, since the occurrence of the event(s) which directly caused the plaintiff's injuries have not been accurately determined, the author wonders whether a "downed" helicopter, resting on its pontoons, while facing the perils of the sea, is still not considered a vessel for admiralty puposes. Does a helicopter become a vessel once it is removed from the sky and placed on a navigable body of water?) Whether we regard a helicopter and a vessel dissimilar in its respective means of mobility, the function and purpose of its mission, together with the situs of an incident, are determinative for issues and concerns of maritime law.

The helicopter involved in this case was clearly involved in a form of commerce directly related to traditional maritime activity and therefore, the Louisiana Court's distinction is one without merit. Further, we submit that where there exists a possible application of admiralty jurisdiction, the factors cited by Schoenbaum, supra, and the "maritime flavor" rationale of *Executive Jet* must be considered in every case to avoid different classifications and provide uniformity.

A LIMITED APPLICATION?

To expect that the application of Article 2317 in

passenger related high seas accidents will be limited to aviation cases is delusive. It is unknown how widespread the ingenuity of the injured plaintiff will be, armed with the munitions of strict liability. If we try to isolate passenger-related helicopter accidents as a basis for the application of strict liability, it would not be long before other passenger accidents on cruise ships, fishing boats, seaplanes, air-boats, hydrofoils, and owners or other similar contrivances would be subjected to responsibility without fault.

Already in *Thomas v. B.J. Titan Services Co.* 1992 WL 47798 (La.App. 4th Cir. 3/17/92) (not yet officially reported), the court rejected defendant's contention that federal maritime law applied by citing the *Green* decision. We can certainly expect every personal injury claim originating in Louisiana offshore waters to include strict liability as its main thrust. We can also expect a comprehensive use of strict liability in every conceivable maritime and admiralty case.

STATE INTEREST VERSUS FEDERAL INTERESTS

The Louisiana Supreme Court emphasized in its opinion Louisiana's interest in deciding the issue of applicable law. However, applying considerations of conflicts of laws or choice of law rules should have no relevance in the determination of maritime jurisdiction and substantive rights. Federal law is supreme where there is a conflict. Uniformity is required. In *Miles v. Apex Marine Corporation*, 111 S.Ct. 317 (1990) a hallmark decision for uniformity and the most recent expression and endorsement of its need, the Court said:

> "Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of the seaman and those dependent upon them" at p. 327.

Under the guise of State interest and contacts, the Louisiana Court failed to realize that it was indeed "sailing in occupied waters" where general maritime law is considered a "preclusive effect' *Miles,* supra at p. 325, 327.

Relationships with the adjacent shore have no relevance to the resolution of whether an action is governed by maritime law, especially when the injury occurs on the high seas beyond the three mile limit. *Offshore Logistics,* supra 106 S.Ct. at p. 2493. If the tort claim is properly within admiralty or maritime jurisdiction, it would made no difference at all how many contacts the parties or vehicles had with the State of Louisiana. This is particularly true since the same contacts and interests are present every time Industrial, or any other Louisiana helicopter company, ferries a Louisiana citizen back and forth between platforms. The fact that a helicopter is "hangared" in Louisiana should not be a consideration in ousting maritime or federal jurisdiction .

The Louisiana Supreme Court incorrctly applied the doctrine of unseaworthiness to a non-seaman helicopter passenger. The only beneficiaries of the doctrine are seamen. *The Osceola,* 189 U.S. 158 (1903). Michael Green was not a seaman and the Court erred and offered no proper legal justification for extending a seaman's remedy to non-seaman residents of Louisiana. "In this setting" state interest alone is not sufficient.

Louisiana's strict liability does not "conform" to the governing federal maritime standard, i.e., requirement of the proof of negligence. Green's injuries occurred on the high seas, "an area where the federal interests are primai . ." *Offshore Logistics,* 106 S.Ct. at p. 2500. In the name of state interest, the Louisiana Supreme Court has disrupted and usurped the primary federal interests in this

case. No amount of state interest can justify a situation where the state remedy *conflicts* with and *replaces* the federal remedy. We must never lose sight that the plaintiff's injuries occurred on the high seas, and, as stated in *Offshore Logistics,* supra, at p. 2500 this is "an area where the federal interests are primary."

SAVINGS TO SUITORS

The import of the "savings to suitors" clause was explained in the Court's decision of *Offshore Logistics, Inc. v. Tallentire,* 106 S.Ct. 2485, 2495 (1986) as follows:

> "The 'savings to suitors' clause leaves state courts competent to adjudicate maritime causes of action in proceedings *in personam* and means that 'a state, "having concurrent jurisdiction is free to adopt such remedies, and to attach to them such incidents, as it sees fit" so long as it does not attempt to [give *in rem* remedies or] make changes in the "substantive maritime law." ' . . . Stated another way, the 'savings to suitors' clause allows state courts to entertain *in personam* maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-*Erie*' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards." (citations omitted) (emphasis added)

Filing suit in state court under the "savings to suitors" clause of the Judiciary Act of 1789 does not create a "maritime but local" situation nor does the state filing create state interest for purposes of offshore maritime personal injury recovery.

CONCLUSION

The acceptance of strict custodial liability is not simply a situation where the general maritime law is being supplemented by state law but is in fact a replacement of general maritime law with state law. A state statue which replaces or substitutes a rule requiring proof of negligence does not and cannot supplement such a rule. Strict liability cannot supplement negligence because the latter is consumed by the former. Such standards cannot mutually exist. From now on, at least in passenger-related accidents occurring on the high seas off Louisiana's coast, plaintiffs will not be required to prove defendant's fault or negligence. However, maritime law will be applied in such situations in the courts of other coastal states. We respectfully submit that replacing or substituting does not supplement and therefore the Louisiana court itself is interfering with and prejudicing the "characteristic features of maritime law". The result is that the maritime rule becomes meaningless.

Petitioner contends that if this Court does not redress the wrong created by the opinion of the Louisiana Supreme Court in *Green v. Industrial Helicopters, Inc.*, 593 So.2d 634 (La. 1992) (APPENDIX A), a once consistent and uniform body of law will be dissected and parcelled into twenty-three different bodies of admiralty law, one for each coastal state. For these reasons, Industrial Helicopters, Inc. 593 So.2d 634 (La. 1992) (APPENDIX A), a once consistent and uniform body of law will be dissected and parcelled into twenty-three different bodies of admiralty law, one for each coastal state. For these reasons, Industrial Helicopters, Inc. requests that this Honorable Court grant its application for writ of certiorari.

DATED this 18th day of May, 1992.

SONNIER, HEBERT & HEBERT
P. O. Drawer 700
Two South Magdalen Square
Abbeville, LA 70511-0700
(318) 893-5973
Fax. No. (318) 893-5983

By: /s/ Charles R. Sonnier
CHARLES R. SONNIER
La. Bar Roll #12260

ATTORNEYS FOR PETITIONER,
INDUSTRIAL HELICOPTERS, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petition and Attachments have been duly mailed to counsel for Respondent, Michael Green, Karl W. Bengtson, Attorney at Law, P. O. Drawer 52548, Lafayette, Louisiana, 70505, and to Respondent, USF&G, Nicholas Gachassin, Jr., Attorney at Law, P. O. Box 2850, Lafayette, Louisiana 70502.

Abbeville, Louisiana this 18th day of May, 1992.

/s/ Charles R. Sonnier
CHARLES R. SONNIER

91-1859

NO. (2)

Supreme Court, U.S.
FILED
MAY 19 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

INDUSTRIAL HELICOPTERS, INC.
Defendant-Petitioner

VERSUS

MICHAEL J. GREEN
Plaintiff-Respondent

UNITED STATES FIDELITY & GUARANTY COMPANY
Plaintiff-intervenor/ Respondent

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

APPENDIX VOLUME I

CHARLES R. SONNIER #12260
SONNIER, HEBERT & HEBERT
Two South Magdalen Square
P. O. Drawer 700
Abbeville, La 70511-0700
(318) 893-5973
ATTORNEYS FOR
INDUSTRIAL HELICOPTERS, INC.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

81

TABLE OF CONTENTS

Page

APPENDICES

APPENDIX A: Opinion of Louisiana Supreme Court and Denial of Rehearing (in globo) A-1

APPENDIX B: Application for Rehearing by Industrial Helicopters to Louisiana Supreme Court A-25

APPENDIX C: Post Argument Brief of Industrial Helicopters to Louisiana Supreme Court A-34

APPENDIX D: Ruling of Louisiana Supreme Court granting Writs of Certiorari of Michael Green and USF&G A-40

APPENDIX E: Opposition by Industrial Helicopters to Application for Writs of Certiorari to Louisiana Supreme Court by Michael Green and USF&G, Plaintiff and Intervenor A-43

APPENDIX F: Opinion of Third Circuit Court of Appeal on remand from the Louisiana Supreme Court A-68

APPENDIX G: Ruling of Louisiana Supreme Court granting Writ of Certiorari of Industrial Helicopters including concurring opinion of Honorable Justice Watson A-75

APPENDIX H: Application for Writ of Certiorari by Industrial Helicopters to Louisiana Supreme Court A-79

TABLE OF CONTENTS (continued)

		Page
APPENDIX I:	Denial of Rehearing Application to Court of Appeal, Third Circuit, State of Louisiana	A-113
APPENDIX J:	*Duhon v. Petroleum Helicopters, Inc.*, 554 So.2d 1270 (La. App. 3rd Cir., 1989) rehearing denied, writ denied	A-115
APPENDIX K:	Application for Rehearing by Industrial Helicopters to Court of Appeal, Third Circuit, State of Louisiana	A-140
APPENDIX L:	Opinion of Court of Appeal, Third Circuit, State of Louisiana	A-150
APPENDIX M:	Judgment of Trial Court	A-163
APPENDIX N:	Opinion of Trial Court (Honorable Judge Don Aaron, Jr.)	A-166

APPENDIX A

Jan 17 1992

No. 91-C-0859 c/w 91-C-0860

Michael J. Green, United States Fidelity & Guaranty Co.

Versus

Industrial Helicopters, Inc.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL THIRD CIRCUIT
Parish of Lafayette, State of Louisiana

CALOGERO, Chief Justice.

The narrow question presented in this case is whether Louisiana Civil Code article 2317[1], which imposes strict liability for injury causing things in one's custody, is applicable in a case cognizable in admiralty but brought in a Louisiana state court pursuant to the "savings to suitors" clause of the Judiciary Act of 1789 as amended.

Originally, the court of appeal held that plaintiff could recover under La. C.C. art. 2317 for an injury in a helicopter crash at sea. *Green v. Industrial Helicopters, Inc.*, 560 So. 2d 684 (La. App. 3d Cir. 1990). We granted writs and remanded to the third circuit court of appeal to determine whether the decision was in conflict with another out of the same circuit, *Duhon v. Petroleum Helicopters, Inc.*, 554 So. 2d 1270 (La. App. 3 Cir. 1989),

---

[1] La. C.C. art. 2317 states:

> We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody.

writ denied, 559 So. 2d 1360 (La. 1990), and if so, to determine which decision is correct. Upon remand, the court of appeal found its original decision,[2] that recovery was available under Article 2317, inconsistent with *Duhon*, supra, and that *Duhon* was correct. *Green v. Industrial Helicopters, Inc.*, 576 So. 2d 1183 (La. App. 3d Cir. 1991). We granted writs once more to examine that determination.

For the reasons which follow we reverse the court of appeal and hold that Article 2317 applies as a supplement to the remedies available under the general maritime law in this maritime personal injury case, since Article 2317 does not impermissibly conflict with the substantive general maritime law.

Plaintiff, Michael J. Green was employed as an offshore oil meter technician for Southern Petroleum Labs ("Southern"). Southern contracted with Industrial Helicopters, Inc. ("Industrial") to carry workers from Louisiana shore sites to offshore platforms. Doug Wright was employed by Industrial as a helicopter pilot. There occurred an emergency helicopter landing on the high seas approximately 150 miles off the Louisiana coast. Plaintiff's lawsuit, filed in the Fifteenth Judicial District Court, State of Louisiana, named as defendants the pilot of the aircraft, Wright, and the pilot's employer, Industrial.

Wright picked up the plaintiff in Milton, Louisiana. From there plaintiff was to be taken to his worksite in the Gulf of Mexico from which he was later to be returned to Milton. En route to the worksite, the pilot refueled at an Exxon platform located 140 miles off the coast of the State

---

[2] 560 So. 2d 684 (La. App. 3 Cir. 1990).

of Louisiana. After refueling and soon after taking off from the Exxon platform, mechanical failure caused the pilot to make an emergency landing in the Gulf. The helicopter's governor had malfunctioned. Workers on the nearby Exxon platform assisted in the rescue of plaintiff and the pilot. Plaintiff suffered injuries in the emergency landing and in the rescue.

Generally, federal maritime jurisdiction is invoked whenever an accident occurs on the high seas and in furtherance of an activity bearing a significant relationship to a traditional maritime activity. *Offshore Logistics v. Tallentire,* 477 U.S. 207, 106 S. Ct. 2485 (1986); *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 93 S. Ct. 493 (1972). The United States Supreme Court has stated that although a helicopter is not a "traditional maritime conveyance," when it is used to ferry passengers from an island to the shore or vice versa it is engaged in a function traditionally performed by waterborne vessels. *Tallentire,* 477 U.S. at 217, 106 S. Ct. at 2492.

The United States Constitution grants to federal district courts jurisdiction in all "cases of admiralty and maritime jurisdiction." U. S. Const. art. III, section 2, *Rodrigue v. Legros,* 563 So. 2d 248, 251 (La. 1990). State courts, however, have concurrent jurisdiction by virtue of the "savings to suitors" clause of the Judiciary Act of 1789.[3] This case, although within the federal admiralty jurisdiction, is brought in state court pursuant to the savings clause.

---

[3] That provision originally stated:

> The district courts shall have exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction...*saving to suitor, in all cases, the right of a common law remedy, where the common law is competent to give it.*

It is well settled that by virtue of the savings clause "a state, 'having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents as it sees fit' so long as it does not attempt to make changes in the substantive maritime law." (citations omitted) *Tallentire,* 477 U.S. at 221, 106 S. Ct. at 2494. As a general proposition, "[a] maritime claim brought in the common law state courts...is governed by the same principles as govern actions brought in admiralty, i.e., by federal maritime law." *Powell v. Offshore Navigation, Inc.,* 644 F.2d 1063, 1065 n. 5 (5th Cir. 1981), See also T. Schoenbaum, *Admiralty and Maritime Law* § 4-1 at 123 (1987) [hereinafter, Schoenbaum]. Since the general maritime law is not a "complete or all inclusive system," a federal court may adopt state statutory law and common law principles as the federal admiralty rule. Schoenbaum, supra, § 4-1 at 123. State law and regulations may also supplement federal maritime law when "there is no conflict between the two systems of law, and the need for uniformity of decision does not bar state action." Id. at 123.

The U. S. Supreme Court has explicitly recognized the difficulty in defining the interplay of state law and federal maritime law, and has stated: "if one thing is clear it is that the source of law in saving-clause actions cannot be described in absolute terms." *Romero v. International*

Footnote 3 continued.

In 1948 this provision was amended to read:

> The district courts shall have original jurisdiction, exclusive of the courts of the states, of any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.* 28 U.S.C.A. § 1333

This amendment has not, however, changed the scope of the savings clause. D. Robertson, *Admiralty and Federalism,* p.134 (1970).

Terminal Operating Co., 358 U.S. 354 at 373, 79 S. Ct. 468 at 480. Indeed, as Justice Dennis of this court has commented, "[d]espite [a] multitude of cases involving maritime situations, the Court has developed no clear test for determining when such application is appropriate and when it violates the Constitution." *Rodrigue v. Legros*, 563 So. 2d at 253. The question whether La. C.C. art. 2317 applies under these circumstances is a res nova issue in this court. Nor has the U. S. Supreme Court directly addressed whether strict custodial liability may be part of the general maritime law, nor expressly authorized Louisiana's supplementation in that fashion for cases properly within Louisiana courts' jurisdiction and tried in those courts.[4]

The process of determining the applicability of state law in cases within the admiralty jurisdiction has been described as:

> one of accomodation entirely familiar in many areas of overlapping state and federal concern, or a process somewhat analogous to the normal conflict of laws situation where two sovereignties assert divergent interests in a transaction as to which both have some concern. *Kossick*, supra at 738.

Thus, state law may be applied where the state's interest in a matter is greater than the federal interest. This principle, applying the state rule in a matter within the admiralty

---

[4] [T]he precise extent to which local rules of law will operate to modify the general maritime law applied in the federal admiralty court is by no means clear. Indeed, it would have to be said that there are not even any clearly visible principles governing the nature and degree of permissible modifications of this sort....[I]t is not clear that state courts are limited with respect to the application of local law to the same degree—whatever it may be—as are the federal admiralty courts." D. Robertson at 146.

jurisdiction when the state interest outweighs the federal interest, has been recognized by the U. S. Supreme Court. See *Huron v. Portland Cement Co. v. City of Detroit,* 362 U.S. 440, 80 S. Ct. 813 (1960) (allowed City of Detroit to impose the requirements of its smoke control regulations on vessels coming to the city, even though vessel owners met federal standards); *Just v. Chambers,* 312 U.S. 383, 61 S. Ct. 687 (1941) (allowed state survival action to supplement maritime law); *Red Cross Line v. Atlantic Fruit,* 264 U.S. 109, 44 S. Ct. 274 (1924) (allowed state court to compel arbitration under arbitration provision of maritime contract reasoning that since it was a valid clause under admiralty law, it was proper to substitute a different and more effective remedy); Cf. *Kossick v. United Fruit Co.,* 365 U.S. 731, 81 S. Ct. 886 (1961) (the U. S. Supreme Court utilized an interest balancing approach but concluded that the need for a uniform rule regarding contracts required allowing the federal rule to prevail).

Louisiana has a strong interest in applying its own law in this case: Plaintiff is a Louisiana resident, Industrial a Louisiana corporation, the pilot a Louisiana resident, and the helicopter was stored in a Louisiana hangar. The contract of carriage between plaintiff's employer and defendants was confected in Louisiana. The mission started in Louisiana and was to end in Louisiana. Plaintiff and defendants, more likely than not, expected to be governed by Louisiana law.

Moreover, La. C.C. art. 2317 embodies a strong social policy to place liability with the owner or custodian of an injury causing thing. This type of liability is not imposed exclusively on helicopter or aircraft owners. Article 2317 liability is imposed on owners and custodians of any thing which, because of an unreasonably dangerous condition, causes injury to another. Also, in the personal injury

area states have much freedom to provide redress for their citizens.

In *Daigle v. Coastal Marine, Inc.*, 488 So. 2d 679, 681 (La. 1986) we stated:

> When congress is silent on a particular question, there is no bar to application of a state statute to its own citizens on the high seas. *Skiriotes v. Florida*, 313 U.S. 69, 61 S. Ct. 924, reh. den. 313 U.S. 599, 61 S. Ct. 1093 (1941). Louisiana can extend the protection of LSA—C.C. art. 2315 to its constitutional limits in personal injury actions involving Louisiana residents where Louisiana has a strong interest in the transaction and there is no conflict with federal law. (citation omitted).

Accordingly, a Louisiana state court should respect Louisiana law unless there is some federal impediment to application of that law contained in federal legislation or a clearly applicable rule in the general maritime law. We have found no such impediment or contrary general maritime rule. Rather, the general maritime law *authorizes* application of state law as a supplement to the general maritime law.

The court of appeal in this case, on the other hand, found that La. C.C. art. 2317 "alters or conflicts with the maritime or admiralty law which establishes the substantive rights of the parties." *Green v. Industrial Helicopters, Inc.*, 576 So. 2d at 1184, citing *Hebert v. Diamond M. Co.*, 376 So. 2d 1210 (La. App. 1st Cir. 1978). This finding was premised upon the assumptions 1) that application of La. C.C. art. 2317 is precluded because the general maritime law does not contain an exact counterpart to Article 2317, and 2) that there is an applicable maritime rule which

requires proof of negligence by a passenger injured in a helicopter crash on the high seas. Although the court of appeal correctly found that the case is governed by the admiralty law, the two underlying assumptions recited above are not well founded. As a matter of logic and legally permissible principle, Louisiana may afford a remedy not traditionally found in the maritime law, provided that the remedy neither conflicts with substantive maritime law nor impermissibly interferes with the requirement of uniformity.

Contrary to the implication of the court of appeal decision, finding an exact counterpart to strict custodial liability in the general maritime law is not a prerequisite for application of La. C.C. art. 2317. The proper inquiry is whether in this setting strict liability under Louisiana law thwarts the purpose of any specific Congressional pronouncement, or "work[s] material prejudice to the characteristic features of maritime law or interfere[s] with the proper harmony or uniformity of that law in its international and interstate relations." *Western Fuel Co. v. Garcia*, 257 U.S. 233, 42 S. Ct. 89 (1921); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S. Ct. 524 (1917). Thus, the balance of this analysis will entail determining whether there is applicable federal legislation, identifying the "characteristic features of maritime law," and examining the scope of the uniformity requirement.

The first step in our examination involves determining whether there is an applicable Congressional pronouncement governing the liability of a helicopter owner to an offshore worker passenger for injuries sustained by the passenger from a crash landing on the high seas caused by the defective condition of the helicopter. Where Congress has spoken in a particular area, courts engage in the familiar pre-emption analysis. *Offshore Logistics*, supra, at

2494-2500; *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 93 S. Ct. 1590 (1973); *Poche v. Avondale Shipyards, Inc.*, 339 So. 2d 1212, 1218 (La. 1976). Although Congress may have "acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law." *Askew*, 411 U.S. at 342, 93 S. Ct. at 1600. Thus, in *Askew* the U. S. Supreme Court refused to enjoin application of the Florida Oil Spill Prevention and Pollution Control Act which imposed strict liability for damage as a result of an oil spill in the state's territorial waters despite the existence of "a pervasive system of federal control over discharges of oil 'into or upon the navigable waters of the United States ...' ". Id. 411 U.S. at 329, 93 S. Ct. at 1954.

The only federal legislation possibly applicable to this incident is Section 1333 (a) of OCSLA, and that statute adopts state law as surrogate federal law. The relevant portions of that section state:

> To the extent that they are applicable and not *inconsistent with...Federal laws and regulations*...the civil and criminal laws of each adjacent State are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon. (emphasis added) 43 U.S.C.A. 1333 (a) 2 (A).

It appears that OCSLA is not applicable to accidents occurring near a structure located on the outer Continental Shelf. The U. S. Supreme Court has said as much in *Offshore Logistics v. Tallentire*, 477 U.S. 217, 106 S. Ct. 2485 (1986), where the wives of two offshore drilling platform workers, who were killed when the helicopter carrying them from a platform to shore crashed on the high seas, contend-

ed that the more generous state law should apply rather than the Death on the High Seas Act (DOHSA). Specifically, the wives argued that state law applied via the state law extension clause of OCSLA because "OCSLA applies to traditionally maritime locales on the high seas, beyond the confines of the platform, when the decedent is a platform worker." Id. at 477 U.S. 218, 106 S. Ct. 2492. The U. S. Supreme Court dismissed this argument by stating:

> The extension of OCSLA far beyond its intended locale to the accident in this case simply cannot be reconciled with either the narrowly circumscribed area defined by the statute or the statutory prescription that the Act not be construed to affect the high seas which cover the Continental Shelf. Nor can the extention of OCSLA to this case be reconciled with the operative assumption underlying the statute: that admiralty jurisdiction generally should not be extended to accidents in areas covered by OCSLA.
>
> * * *
>
> We do not interpret...43 U.S.C. § 1333, to require or permit us to extend the coverage of the statute to the platform workers in this case who were killed miles away from the platform and on the high seas simply because they were platform workers. Id. 477 U.S. at 218, 106 S. Ct. at 2492.

Tallentire was admittedly a wrongful death case under DOHSA. The U. S. Supreme Court nonetheless found reason to determine that section 1333 (a) of OCSLA does not apply to accidents occurring on the high seas near an OCSLA covered area. This conclusion should apply equally to the personal injury case under consideration here. Since

this accident occurred near but not on a platform located on the outer Continental Shelf, OCSLA's state law extension clause is therefore not triggered.

Absent a clearly applicable act of Congress—and there is none here—we next look to the general maritime law to determine if application of La. C.C. art. 2317 would materially prejudice the "characteristic features of maritime law."

The traditional remedies available for employee injuries occurring within admiralty depend upon a person's classification as a seaman, a non-seaman maritime worker, or a nonmaritime worker. Remedies available to "seamen" include wages, maintenance and cure for injury or illness. Recovery includes payment of actual wages, payment for food and lodging, and the providing of necessary medical services. Seamen have claims, too, for personal injury damages caused by the unseaworthy condition of the vessel. The Jones Act also allows a seaman to recover damages for personal injury occurring because of the negligence of the seaman's co-workers or employer. 46 U.S.C. § 688. Shore-based maritime workers may recover workers' compensation from their employers under the Longshore and Harbor Workers' Compensation Act (LHWCA). 33 U.S.C.S. §§ 901 et seq. Offshore workers may recover compensation from their employers under the LHWCA by virtue of Section 1333 (b) of the Outer Continental Shelf Lands Act (OCSLA).[5]

---

[5] 43 U.S.C.A. 1222 (b). Section 1333 (a) calls for the application of state law as "surrogate" federal law. Section 1333 (b), which allows offshore workers to recover under the LHWCA:

> is expansive...[and] extends to every injury or death "occurring as a result of operations...for the purpose of exploring for, developing, removing, or transporting...natural resources. 43 U.S.C.A. § 1333 (b). The

The shipowner's exposure for unseaworthiness is a form of liability without fault in that liability is imposed upon the vessel owner, whether the owner is the injured seaman's employer or a third party, and without regard to his due care or negligence. *The Osceola*, 189 U.S. 158, 23 S. Ct. 483 (1903). It applies if the seaman's injury was caused by a defective condition of the ship, its equipment or appurtenances." Schoenbaum, supra, § 5-3. The warranty of seaworthiness was extended to persons other than "seamen" in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872 (1946), although amendments to the LHWCA later eliminated this action.[6]

The U. S. Supreme Court has not addressed whether non-seamen passengers aboard a vessel have an action for unseaworthiness.[7] Lower federal courts, however, have

---

Footnote 5 continued.

> state law extension clause [§ 1333 (a)], however, is considerably narrower, providing only for the application of state law to "the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon." *Barger v. Petroleum Helicopters, Inc.*, 692 F.2d 337, 340 (5th Cir. 1982).

[6] The Longshore and Harbor Workers Compensation Act was amended in 1972 and those amendments expanded the categories of workers covered by the Act. The amendments also provide that employees covered by the Act may not assert a cause of action for unseaworthiness. Thus, so called "Sieracki" seamen may no longer assert an unseaworthiness cause of action. T. Schoenbaum, § 5-4 at 171.

[7] Norris suggests that the doctrine of unseaworthiness should be extended to non-seaman passengers aboard a vessel, stating:

> The enlightened view of the present day courts in demanding that a vessel be reasonably fit—and its interpretation of what is reasonable fitness—should apply to the passengers carried in those ships if for no

held that the basis of recovery of damages from a carrier for personal injury to a passenger is predicated on the theory of negligence. M. Norris, *The Law of Maritime Personal Injuries 4th Ed.* § 3:4 at 63 (1990) [hereinafter, Norris].[8]

The latter are among the cases upon which the court of appeal in this case bases its conclusion, and Industrial relies, for its position that Article 2317 conflicts with the general maritime law. The argument is not without some appeal. However, it does not take into account that general maritime law distinctly authorizes application of supplementary state law in some situations. In our considered judgment, the general maritime law authorizes application of state law under the circumstances of this case.

Although the passenger-carrier cases referred to above are somewhat analogous there is this important difference. Those cases involved passengers aboard vessels. And the need for uniformity under the general maritime

---

Footnote 7 continued.

> other reason than that passengers should be accorded relief now given to cargo. M. Norris, *The Law of Maritime Personal Injuries*, § 3:25 at 102.

[8] See *Katz v. Cie Generale Transatlantique*, 271 F.2d 590 (4th Cir. 1959) (plaintiff injured foot on door sill of ship, carrier liable because of negligent construction and inadequate lighting); *Moore-McCormack Lines, Inc. v. Russak*, 266 F.2d 573 (9th Cir. 1959) (plaintiff injured while dancing on ballroom floor of ship because of slippery condition caused by smashed grape on floor; carrier liable and owes highest degree of care to passenger); *Moore v. American Scantic Line, Inc.*, 121 F.2d 767 (2d Cir. 1941) (plaintiff injured while skipping rope on bridgedeck when foot struck uneven spot on deck; defendant liable because owes duty to exercise very high degree of care for safety of passengers); *Counts v. Lafayette Crewboats, Inc.*, 622 F. Supp. 299 (W.D. La. 1983) (plaintiff injured due to his own negligence while attempting to step from platform onto crewboat).

law is prompted primarily by concern regarding maritime shipping and commerce *involving vessels.* The U.S. Supreme Court has declared that helicopters and other aircraft are not vessels, and commentators have urged that aircraft should not be treated like vessels. *Offshore Logistics v. Tallentire,* supra, *Smith v. Pan Air Corp.,* 684 F.2d 1102 (5th Cir. 1982); See also Schoenbaum, supra, § 3-6 at 80; R. Greco, *Aircraft As Vessels Under the Jones Act and General Maritime Law,* 22 S. TEX. LJ 595 (1982); Comment, *Admiralty Jurisdiction: Airplanes and Wrongful Death in Territorial Waters,* 64 Columbia Law Review 1084, 1089 n. 51-56 (1964). Aircraft are designed to cope with the perils of the air rather than the hazards of the sea. *Barger v. Petroleum Helicopters, Inc.,* 692 F.2d 337 (5th Cir. 1982), rehearing denied 698 F.2d 1216 (5th Cir. 1983). The U. S. Supreme Court in *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio,* 409 U.S. 249, 93 S. Ct. 493 (1972) "noted that substantive maritime law ha[s] developed to serve a specialized industry, the transportation of goods and persons by water. Although aviation ha[s], to some extent, supplanted this traditional maritime activity, the ancient body of substantive law tailored to fit the needs of vessels and mariners was not suited to the problems of aircraft and aviation." J. Forney and M. Sydow, *Admiralty Jurisdiction Over Injuries to Offshore Workers: A Call for Reconsideration of Robison,* 22 S. Tex. LJ 461, 463 (1982).[9] Had the helicopter crashed on land

---

[9] Justice Stewart, writing for the Court in *Executive Jet* heavily criticized the inclusion of aircraft in admiralty law and stated:

> The law of admiralty has evolved over many centuries, designed to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. That law deals with navigational rules—rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of ad-

soon after taking off from Milton, Louisiana, without question a Louisiana court hearing the case could and should apply La. C.C. art. 2317.

Moreover, there is in the general maritime law no prohibition against strict liability. On the contrary, the general maritime law embraces strict liability in various forms. Most recently the U. S. Supreme Court has recognized "products liability, including strict liability, as part of the general maritime law." *East River S.S. Corp. v. Transamerica Delaval,* 476 U.S. 858, 106 S. Ct. 2295 (1986). The rationale that "[s]trict liability should be imposed on the party best able to protect persons from hazardous equip-

---

Footnote 9 continued.

> miralty looks to those rules to determine fault, liability, and all other questions that may arise from such a catastrophe. Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.
>
> Rules and concepts such as these are wholly alien to air commerce, whose vehicles operate in a totally different element, unhindered by geographical boundaries and exempt from the navigational rules of the maritime road. The matters with which admiralty is basically concerned have no conceivable bearing on the operation of aircraft, whether over land or water. ...Although dangers of wind and wave faced by a plane that has crashed on navigable waters may be superficially similar to those encountered by a sinking ship, the plane's unexpected descent will almost invariably have been attritutable to a cause unrelated to the sea—be it pilot error, defective design or manufacture of airframe or engine, error of a traffic controller at an airport, or some other cause; the determination of liability will thus be based on factual and conceptual inquiries unfamiliar to the law of admiralty. 409 U.S. at 269-70, 93 S. Ct. at 505.

ment" applies equally to strict products liability claims, Id. 476 U.S. at 866, 106 S. Ct. 2299. Another form of strict liability recognized in the general maritime law is the above discussed seaman's action for unseaworthiness. Given the lack of maritime rule clearly applicable to a helicopter crash on the high seas and the recognition of liability in the absence of fault in the general maritime law, strict custodial liability embodied in Louisiana Civil Code article 2317 cannot be said to "materially prejudice" characteristic features of the general maritime law.

The last step in our inquiry requires analyzing the scope of the uniformity requirement. The requirement of national uniformity in the area of the maritime law has dictated that state law not apply in certain situations. D. Robertson at 146; See cases cited in *Rodrigue v. Legros,* 563 So. 2d at 252; *Kossick v. United Fruit Co.,* supra, *Southwestern Sugar & Molasses Co. v. River Terminals Corp.,* 358 U.S. 811, 79 S. Ct. 38 (1959); *Bisso v. Inland Waterways Corp.,* 349 U.S. 85, 75 S. Ct. 629 (1955); *Pope and Talbot, Inc. v. Hawn,* supra; *Robbins Dry Dock & Repair Co. v. Dahl,* 266 U.S. 449, 45 S. Ct. 157 (1925).

On the other hand, courts have from time to time supplemented general maritime law with state law, such as in cases affecting "the exercise of...[the state's] police powers or in the provision of an additional maritime tort remedy." *Powell,* supra, at 1065, n. 5 referring to *Askew v. American Waterways Operators, Inc.,* 411 U.S. 325, 93 S. Ct. 1590 (1973), rehearing den. 412 U.S. 93, 33 S. Ct. 2746 (1973); *Romero v. International Terminal Operating Co.,* supra, 358 U.S. at 373-74, 79 S. Ct. at 480-81; *Just v. Chambers,* 312 U.S. 383, 387-92, 61 S. Ct. 687, 690-93 (1941). As Justice Black acknowledged in *Pope & Talbot v. Hawn,* 346 U.S. 406, 410, 74 S. Ct. 202, 205 (1953), "states may sometimes supplement federal maritime policies

[although] a state may not deprive a person of any substantial maritime rights." The U. S. Supreme Court later stated that:

> [i]t is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the states a wide scope. State-created liens are enforced in admiralty. State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes. State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance-all these laws and others have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity. *Romero v. International Term. Operat. Co.*, 358 U.S. 354, 373, 79 S. Ct. 468, 480-481 (1959).

Generally where maritime contracts are involved, the federal interest is at its "zenith," *Rodrigue v. Legros,* supra, while in maritime tort cases the interest in uniformity is minimal because of the "fortuitous nature of accidential injuries and the strong state interest in providing redress for injuries." Id. at 254. The uniformity requirement is also tempered with a recognition that in some matters local concerns outweigh the federal need for a uniform admiralty rule. To this end the "maritime but local" doctrine emerged from U. S. Supreme Court decisions. See *Western Fuel Co. v. Garcia,* supra, §§ 4:5, 4:6 at 115-122.

Underlying the "maritime but local" doctrine is the rationale that "[i]f it [can] be said that the work activities of the injured employee [have] no direct concern with navigation or commerce, it [is] 'local' and therefore the State laws [are] applicable." Norris, supra, § 4:6 at 117. The Court has extended this reasoning to recognize a "twilight zone" or "area of doubt" within which the Longshore and Harbor Worker's Compensation Act and state compensation acts may overlap, allowing the injured worker to recover under either of them. Norris, supra, § 4:6 at 121; See *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, 79 S. Ct. 266, (1959); *Davis v. Department of Labor & Industries*, 317 U.S. 249, 63 S. Ct. 225 (1942).

The respect for comity underlying the "maritime but local" doctrine remains a viable rationale for allowing state law to supplement the general maritime law. See *Askew v. American Waterways Operators, Inc.*, supra, (states may constitutionally exercise their police power regarding maritime activities concurrently with Federal Government); *Palestina v. Fernandez*, 701 F.2d 438 (5th Cir. 1983) (boating accident which occurred on navigable Louisiana waterway described as a "garden variety state tort claim" and the state law applied); *Baggett v. Richardson*, 473 F.2d 863 (5th Cir. 1973) (fight aboard a vessel considered a Louisiana tort claim in all other respects). This court applied the "maritime but local" and "twilight zone" doctrine in *Beverly v. Action Marine Services, Inc.*, 433 So. 2d 139 (La. 1983) to allow the nondependent parents of a deceased employee of a company engaged in cleaning and repairing ocean-going vessels, recovery under the Louisiana Workers' Compensation Act despite lack of a remedy in favor of nondependent parents under the LHWCA.

An offshore worker's employment activities have no "direct concern" with maritime shipping or commerce.

Norris, supra, § 4:6 at 117. The U. S. Supreme Court has stated that work related to offshore oil and gas exploration is not "maritime employment." *Herb's Welding Inc. v. Gray,* 470 U.S. 414, 105 S. Ct. 1421 (1985). Therefore, the tangential relationship of offshore drilling to traditional maritime activities along with the strong Louisiana interest in a case of this nature bring this case within the "maritime but local" doctrine.

That offshore employment is of particularly local concern and not a maritime vocation is evidenced by the policies underlying Section 1333 (a) of OCSLA. In that "state law extension clause," Congress "deliberately eschewed the appliction of admiralty principles" to incidents occurring on a platform or island on the outer Continental Shelf since "accidents on the artificial islands covered by OCSLA '[have] no more connection with the ordinary stuff of admiralty than do accidents on piers.' " *Tallentire,* 477 U.S. at 217, 106 S. Ct. 2491 citing *Rodrigue vs. Aetna Casualty & Surety Co.,* 395 U.S. 352, 361-366, 89 S. Ct. 1835, 1840-1842 (1969). Instead, Congress adopted the law of the adjacent state as "surrogate" federal law governing accidents occurring on "the subsoil and seabed of the OCS and artificial islands and fixed structures erected thereon." Implicitly, this provision recognizes the offshore worker's significant tie with the adjacent state. Had Green been injured on the Exxon platform, Louisiana law could have been applied via the state law extension provision of OCSLA (provided of course that it is not "inconsistent ... with Federal laws and regulations"). 43 U.S.C.A. 1333 (a) 2 (A); *Olsen v. Shell Oil Company,* 365 So. 2d 784 (La. 1978).

Further evidence that Congress is not insistent on uniformity in the maritime law regarding offshore exploration and drilling is found in the 1982 amendment to the Jones Act, now found in section 688 (b). That statue precludes maintenance and cure and Jones Act claims for

damages, regarding incidents occurring in territorial waters overlaying the Continental Shelf of a nation other than the United States, its territories and possessions if there is a remedy available under the laws of the nation asserting jurisdiction over the area or under the laws of the nation where at the time of the incident the injured person maintains citizenship or residency. 46 U.S.C.A. 688 (b).[10]

It is evident from the cases just discussed and the federal statutes to which we have alluded that there is a lessened need for uniformity in a case like the one before us.

In summary we conclude that there is no applicable contrary federal legislation and that La. C.C. art. 2317 neither prejudices the characteristic features of the general maritime law nor interferes impermissibly with any required uniformity in such law.

---

[10] Section 688 (b) of the Jones Act (46 U.S.C.A. 688 (b)) states:

> (1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred—
>
> * * *
>
> (B) in the territorial waters or waters overlaying the conntinental shelf of a nation other than the United States, its territories, or possessions.
>
> (2) The provisions of paragraph (1) of this subsection shall be applicable if the person bringing the action extablishes that no remedy was available to that person—
>
> (A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred: or
>
> (B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

Article 2317 applies in this case. The court of appeal panel, in its opinion of April 18, 1990, is correct. The more recent opinion of the court of appeal sitting en banc is incorrect. *Duhon v. Petroleum Helicopters, Inc.*, 554 So. 2d 1270 (La. App. 3 Cir. 1989), writ denied, 559 So. 2d 1360 (La. 1990), is overruled.

DECREE

For the foregoing reasons the March 13, 1991, judgment of the court of appeal on remand, 576 So. 2d 1183 (La. App. 3 Cir. 1991), is reversed and set aside. Judgment of the court of appeal, dated April 18, 1990, 560 So. 2d 684 (La. App. 3d Cir. 1990), which amended and affirmed the district court, and remanded to the district court on an incidental issue,[11] is reinstated and affirmed.

---

[11] After the district court judgment in favor of plaintiff was rendered and after the delay for suspensive appeal had run, upon motion to the court Industrial deposited the amount of the judgment plus accrued interest into the registry of the court. This procedure is a jurisprudential creation which allows a defendant cast in judgment to stop the accrual of legal interest. *LaGraize v. Bickham*, 391 So. 2d 1185 (La. App. 4th Cir. 1980). The trial judge granted Industrial's motion without a contradictory hearing. Plaintiff appealed to increase the award and Industrial, in its answer, contended that the deposit of money into the registry effectively terminated the accumulation of legal interest on the amount of the judgment. The court of appeal, in its decision of April 18, 1990, concluded that the trial judge erred in granting the motion ex parte and remanded this issue to the trial court to determine if the conditions of *LaGraize* were met.

SUPREME COURT OF LOUISIANA

NO. 91 C 0589 c/w 91 C 0860

MICHAEL J. GREEN,
UNITED STATES FIDELITY & GUARANTY CO.

Versus

INDUSTRIAL HELICOPTERS, INC.

WATSON, Justice, Concurring.

In the field of personal injury, state law may supplement general maritime law. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 101 S. Ct. 2870, 69 L.Ed.2d 784 (1981). Louisiana's law of strict liability applies to injuries on the outer continental shelf off the shores of Louisiana. *Olsen v. Shell Oil Company*, 365 So. 2d 1285 (La. 1978). Only when there are deaths on the high seas does DOHSA pre-empt state law. *Tallentire; Smith v. Pan Air Corp.*, 684 F.2d 1102 (5th Cir. 1982).

I concur to note that the majority's analysis of OCSLA may err in drawing a bright line of demarcation between platform injuries and high sea injuries. In *Tallentire*, the platform workers were killed miles away from the platform. By its terms, OCSLA's scope is not limited to platforms. A platform worker who is injured in the water near a rig has maritime situs. *Executive Jet Aviation v. Cleveland*, 409 U.S. 249, 93 S. Ct. 493, 34 L.Ed.2d 454 (1972). However, the worker may lack maritime status. *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352,

23 L.Ed.2d 360, 89 S. Ct. 1835 (1969); *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 105 S. Ct. 1421, 84 L.Ed.2d 406 (1985). Therefore, a platform worker's injuries in the water are not necessarily maritime and may be covered by OCSLA.

I respectfully concur in the majority opinion.

SUPREME COURT OF LOUISIANA

FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE # 024

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the *20th day of February, 1992,* the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

REHEARING GRANTED:

88-KH - 2816 STATE EX REL IRA JOE MIMS V. HILTON BUTLER, WARDEN LOUISIANA STATE PENITENTIARY (Parish of Caddo) Gaudin, J., for Hall, J., recused.

REHEARINGS DENIED:

91-C - 0859 C/W 91-C - 0860 MICHAEL J. GREEN, UNITED STATES FIDELITY & GUARANTY CO. v. INDUSTRIAL HELICOPTERS, INC. AND DOUG WRIGHT (Parish of Lafayette)

91-C - 1009 SUCCESSION OF CHARLIE DOLL VS PADDY ANN DOLL CONSOLIDATED WITH LUDEWEKA DOLL SULLIVAN v. PADDY ANN DOLL (Parish of Caddo) (Two Applications)

91-C - 1357 JENERA MUNDY v. THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES, ET AL (Parish of Orleans)

91-C - 1377 KARLAN GREENE, ET AL v. GULF COAST BANK (Parish of Vermilion)

91-CA - 1565 ARNY RAY REED, JERRY T. BOYCE, AND FIVE M ENTERPRISES, INC., D/B/A TRIANGLE SHELL v. THE CITY OF NEW ORLEANS AND PAUL MITCHELL, JR., DIRECTOR OF FINANCE OF THE CITY OF NEW ORLEANS (Parish of Orleans)

APPENDIX B

IN THE

SUPREME COURT OF LOUISIANA

NUMBER: 91-C-0859 and 91-C-0860

MICHAEL J. GREEN
Applicant-Plaintiff

UNITED STATES FIDELITY
& GUARANTY COMPANY
Applicant-Intervenor

VERSUS

INDUSTRIAL HELICOPTERS, INC.
Respondent-Defendant

APPLICATION FOR REHEARING
ON BEHALF OF RESPONDENT-DEFENDANT,
INDUSTRIAL HELICOPTERS, INC.

CHARLES R. SONNIER # 12260
FRED W. DAVIS # 1817
SONNIER, HEBERT & HEBERT
Two South Magdalen Square
P.O. Drawer 700
Abbeville, La 70511-0700
(318) 893-5973
ATTORNEYS FOR
INDUSTRIAL HELICOPTERS, INC.

IN THE

SUPREME COURT OF LOUISIANA

DOCKET NUMBERS: 91-C-0859 and 91-C-0860

MICHAEL J. GREEN, Applicant-Plaintiff
UNITED STATES FIDELITY
& GUARANTY COMPANY, Applicant-Intervenor

VERSUS

INDUSTRIAL HELICOPTERS, INC.,
Respondent-Defendant

APPLICATION FOR REHEARING

NOW INTO COURT, through undersigned counsel, comes **INDUSTRIAL HELICOPTERS, INC.**-Respondent-Defendant in these proceedings, who respectfully represents that the judgment of this Honorable Court rendered herein on the 17th day of January, 1992, reversing the judgment of the En Banc panel of the Third Circuit Court of Appeals, on remand, 576 So.2d 1183 (La. App. 3rd Cir. 1991) and reinstating the judgment of the Third Circuit Court of Appeals rendered April 18, 1990, 560 So.2d 684 (La. App. 3rd Cir. 1990), is erroneous and contrary to the law and is prejudicial to **INDUSTRIAL HELICOPTERS, INC.** for the following reasons:

I.

The Louisiana Supreme Court has created a new federal cause of action and is not enpowered to do so, that power being exclusively reserved to the United States Congress or the United States Supreme Court.

2.

The decision of the Louisiana Supreme Court will result in various and different remedies for passengers of helicopters and other aircraft and vessels who are injured on the high seas, *depending primarily on their state citizenship and the proximity of the accident site to the state involved (on the Federal waters in which the accident occurs)*. This will result in non-uniformity of application of general maritime principles in contravention of the federal supremacy clause and the federal pre-emption of state law when the state law conflicts with federal law.

3.

INDUSTRIAL HELICOPTERS, INC. files herewith in connection with this application for a rehearing, a brief in support thereof and shows that for the reasons hereinabove stated and set forth in said brief, a rehearing should be granted.

WHEREFORE, premises considered, **INDUSTRIAL HELICOPTERS, INC.** prays that a rehearing be granted in this appeal and that after due proceedings are had, the judgment rendered herein on the 17th day of January 1992, be set aside and reversed and that there be judgment herein dismissing the Plaintiff's cause of action in its entirety.

Respectfully submitted,

SONNIER, HEBERT & HEBERT

BY: /s/ Charles R. Sonnier

CHARLES R. SONNIER #12260
FRED W. DAVIS #1817
K. WADE TRAHAN #20474
Two South Magdalen Square
P. O. Drawer 700
Abbeville, LA 70511-0700
(318) 893-5973
ATTORNEYS FOR
RESPONDENT-DEFENDANT,
**INDUSTRIAL HELI-
COPTERS, INC.**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served the foregoing pleading on all counsel of record herein by depositing a copy of same in the U.S. Mail, postage prepaid and properly addressed.

Abbeville, Louisiana, this 30th day of January, 1992.

/s/ Charles R. Sonnier

CHARLES R. SONNIER

IN THE

SUPREME COURT OF LOUISIANA

DOCKET NUMBERS: 91-C-0859 and 91-C-0860

MICHAEL J. GREEN, Applicant-Plaintiff
UNITED STATES FIDELITY
& GUARANTY COMPANY, Applicant-Intervenor

VERSUS

INDUSTRIAL HELICOPTERS, INC.,
Respondent-Defendant

ORDER

Considering the foregoing Application by **Industrial Helicopters, Inc.** and being of the opinion that good cause is shown therein for granting rehearing, let the above entitled and numbered cause be fixed for argument as a preference case.

NEW ORLEANS, LOUISIANA, this ____ day of _____,1992.

SUPREME COURT JUSTICE

3101-5/PLDG/REHERING.MOT

BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

The Court's decision, holding state strict liability, Civil Code Article 2317, applicable to a non-seaman passenger injured in offshore Federal waters, if allowed to stand, will create havoc in the maritime personal injury law of the United States. The recognition of legitimate state interests must be tempered with those circumstances where the state law conflicts with, rather than supplements, General Maritime Law remedies, as Civil Code Article 2317 does in this case. State interest must also be balanced with the spectre of the creation of different remedies applying to the same type of injury, depending on the adjacent state's law.

The "characteristic features of the General Maritime Law" are "materially prejudiced" by this decision. One can envision non-seaman helicopter passengers injured in offshore watrers, beyond the territorial limit, yet not subject to OCSLA, being subject to different levels of relief and having various laws (each adjacent state's laws) apply to their circumstance depending on the fortuitous event of the site of the accident. The General Maritime Law has always been opposed to any such operation of law and this decision now sets these possibilities in motion.

What about the passenger on a cruise ship? The decision now places those passengers subject to any number of laws even though the ship follows a path in Federal waters. *Everett v. Carnival Cruise Lines, Inc.*, 912 F.2d 1355 (11th Cir. 1990) held that Federal Admiralty Law rather than Florida law controlled the substantive issue in a case where a passenger sued a cruise line for injuries when she tripped over a metal threshold cover of a fire door. Following a long line of cases, the court held that the case involved a

maritime tort on Federal waters and Federal Admiralty Law should control. "If the injury occurred on navigable waters, Federal Maritime Law governs the substantive issue". *Everett* at p. 1358.

If a Louisiana resident, cruise ship passenger boards a cruise ship in Louisiana waters with a vessel corporation domiciled in Louisiana, and the passenger is injured off the coast of Louisiana beyond the territorial waters, the decision of this Court would compel no other finding but that Louisiana law should apply. Would the result be the same if the passenger was a Texas resident? What if the vessel was domiciled in Mississippi? Although the connexity with the State interest may be a viable interest, once the three-mile territorial limit is exceeded then the vessel is operating in Federal waters and is under the Federal Admiralty jurisdiction. The body of law to be applied in any injury which occurs beyond that three-mile territorial limit, as previously held in prior jurisprudence, is the Federal Admiralty Law which includes the jurisprudentially established General Maritime Law.

Courts will not always be presented with such a "pure" state interest circumstance as in *Green*. What if Mississippi and/or Texas also had an interest in this case? Which law would then apply? This is not an area where the facts and circumstances of each case should control. The uniformity of remedies under the General Maritime Law should control.

In conjunction with the uniformity requirement, the situs of the incident and its connexity with maritime commerce are critical. *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 106 S. Ct. 2485, 91. L. Ed 2d 174 (1986) *did* hold that a helicopter performs traditional maritime activity and can be classified as a vessel, yet this Court ignores this

later Supreme Court pronouncement, fourteen years after *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972). This Court's holding reduces the value placed upon the uniformity requirement of admiralty law and isolates this case from a hundred years of admiralty jurisprudence. This ruling is adverse to all prior jurisprudence regarding the applicability of State law beyond the three-mile territorial limits. Should this case be upheld, it would severely impact admiralty tort law and open the flood gates to further litigation.

Ali v. Offshore Co., 753 F.2d 1327 (5th Cir. 1985) at footnote 11 on page 1332 sets forth language which further isolates the *Green* decision. The Fifth Circuit states:

> Even if the Louisiana law of products liability applies to the manufacturers in this case, we doubt very much whether art. 2317 could be applied to the owners and operators of the ship. It appears to us that such recognized remedies in admiralty as the Jones Act and the suit for breach of warranty of seaworthiness would preempt the field and prevent the application of conflicting Louisiana law.

Toups v. Du-Mar Marine Construction, Inc., 644 F. Supp (E.D. La. 1985) held that Civil Code Article 2315 did not supply a remedy in addition to that provided by General Maritime Law, but in fact, imposed relief which the General Maritime Law did not allow. *Toups* found that since this seaman had no right to sue for negligence under the General Maritime Law, his survivors could not sue for loss of society, on a negligence theory. Although the context of law in *Toups* is different, the guiding principle remains. That is, Louisiana law cannot provide a remedy which conflicts with the substantive maritime law. The same should hold true in the *Green* case.

We urge the Court to reconsider and grant rehearing.

Respectfully submitted,

SONNIER, HEBERT & HEBERT

BY: /s/ Charles R. Sonnier
CHARLES R. SONNIER #12260

BY: /s/ Fred W. Davis
FRED W. DAVIS #1817
Two South Magdalen Square
P. O. Drawer 700
Abbeville, LA 70511-0700
(318) 893-5973
ATTORNEYS FOR
RESPONDENT-DEFENDANT,
INDUSTRIAL HELI-
COPTERS, INC.

3101-5/SUPPORT.RHG

APPENDIX C

IN THE

SUPREME COURT OF LOUISIANA

NUMBER: 91-C-0859 and 91-C-0860

MICHAEL J. GREEN
Applicant-Plaintiff

UNITED STATES FIDELITY
& GUARANTY COMPANY
Applicant-Intervenor

VERSUS

INDUSTRIAL HELICOPTERS, INC.
Respondent-Defendant

POST ARGUMENT BRIEF
ON BEHALF OF RESPONDENT,
INDUSTRIAL HELICOPTERS, INC.,

CHARLES R. SONNIER # 12260
FRED W. DAVIS # 1817
SONNIER, HEBERT & HEBERT
Two South Magdalen Square
P.O. Drawer 700
Abbeville, La 70511-0700
(318) 893-5973
ATTORNEYS FOR
INDUSTRIAL HELICOPTERS, INC.

POST ARGUMENT BRIEF

MAY IT PLEASE THE COURT:

INDUSTRIAL HELICOPTERS, INC., Respondent-Defendant, files this post argument memorandum to address the issues raised by this Honorable Court at the hearing of this matter.

Respondent will address the non-applicability of the Outercontinental Shelf Lands Act and distinguish the case of *Smith vs. Pan Air Corporation*, 684 F.2d 1102 (5th Cir. 1982).

The Congressional enactment of the Outercontinental Shelf Lands Act, 43 USC § 1333 *et seq.* (hereinafter "OCSLA") was a legislative derivative of Congress' intent to protect offshore workers, utilized in the extraction of petroleum products from the subterranean ocean floor beyond the State territorial limits. Congress recognized the problem facing offshore workers who lacked the requisite foundation to be declared "*seamen*". By enacting the OCSLA, Congress allowed State law to be applied to accidents occurring on fixed platforms beyond the three-mile territorial limit. In *Smith*, the Fifth Circuit held tht admiralty jurisdiction extends to non death claims arising on the high seas if the aircraft being utilized has a maritime nexus. The Court further went on to state that the "locale test" governs the application of the OCSLA to torts occurring beyond the territorial limits. The *Smith* court noted that the ferrying of passengers to and from offshore platforms is indicative of a traditional maritime activity therefore admiralty jurisdiction is applicable. The same jurisdiction is applicable before this Court. In only one instance has the OCSLA been applied to an action in which the initial impact was not sustained on the platform. In *In*

re Dearborn Marine Services, Inc., 499 F.2d 263 (5th Cir. 1974), *cert. dismissed*, 423 US 886, 96 S.Ct. 163, 46 L.Ed.2d 118 (1975), a platform worker was on a standy vessel when an explosion occurred on the platform. A ball of fire engulfed the standby vessel killing the worker. The court noted however that the tortious conduct arose from the platform and State Law was invoked through the Outercontinental Shelf Lands Act.

In a case decided after *Smith, Offshore Logistics, Inc. vs. Tallentire*, 477 US 207, 91 L.Ed.2d 174, 106 S.Ct. 2485 (1986), the Supreme Court barred the application of the Louisiana Wrongful Death Statute under the provisions of the OCSLA and found it to be inconsistent with applicable federal law. The facts of the *Tallentire* case (particularly the maritime connexity on the high seas) closely parallel the case before this Honorable Court with the exception that the injury resulted in death. *Tallentire* held that the applicability of the OCSLA is confined to the artificial islands permanently affixed to the subsoil and sea bed of the Outercontinental Shelf. Accordingly, the state law application which derives from the OCSLA hinges on the requirement that the accident or injury occur on the fixed platform and is on the outer-continental shelf or that the tortious conduct arises from the fixed or artificial platform. That is not what occurred here and any reliance upon *Smith* is misplaced in light of *Tallentire*.

State law cannot apply as surrogate federal law in any instance if there is a conflict with the remedy under State Law and the federal general maritime law. This principle was most recently recognized in *Dean v. Maritime Overseas Corp.*, 770 F.Supp. 309 (E.D.La. 1991) citing *Pope & Talbot v. Hawn*, 346 US 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953) which held that while state law may supplement federal maritime policies, federal maritime law controls

rights of recovery rooted in admiralty. In the case before this Court, that irreconcilable conflict between state and federal law *does* exist and this Court should find that the general maritime law applies and that the state law of strict custodial liability is inapplicable, denying Green's claim.

The OCSLA under Section 1333(a)(1) requires extension of U.S. law to the subsoil and seabed of the Outercontinental Shelf *and* all artificial islands (drilling platforms, etc.). This is a dual requirement with the use of the conjunctive "and." Thus, it is not enough to rely on the portion of the statute which addresses the subsoil and seabed but the incident complained must also be related to "artificial islands" which are permanently or temporarily affixed and are not classified as vessels under admiralty law. These requirements are not met in this case.

Furthermore, even if assuming arguendo, OCSLA applies, Section 1333(2)(A) restricts the application of adjacent state law to those laws which are applicable and *not inconsistent* with Federal Law. Federal general maritime law is clear and is substantively different from state law. State law can serve as surrogate state law or supplement federal law *only when* it is not inconsistent with the maritime law. Louisiana's Civil Code Article 2317 (liability without fault) *is* inconsistent with general maritime law (proof of negligence) and thus, Green's claim must be dismissed.

For the Court to reverse the Third Circuit's *en banc* decision it will have to place an interpretation on the OCSLA which the *Smith* case does not warrant and which no court has placed upon it. This Court will also overrule a long line of jurisprudence which (1) accentuates the importance of locality test in admiralty matters and (2) requires

federal supremacy when a state law is inconsistent with federal general maritime law. *Offshore Logistics, Inc. v. Tallentire, supra,; Hebert v. Diamond M Company,* 367 So.2d 1210 (La. App. 1st Cir. 1978); *Freeport Sulphur Company v. S.S. Hemosia,* 526 F.2d 300 (5th Cir. 1976); *State of Louisiana ex rel Guste v. M/V Testbank,* 752 F.2d 1019 (5th Cir. 1985).

Respectfully submitted,

SONNIER, HEBERT & HEBERT

BY: /s/ Charles R. Sonnier

CHARLES R. SONNIER #12260
FRED W. DAVIS #1817
K. WADE TRAHAN #20474
Two South Magdalen Square
P. O. Drawer 700
Abbeville, LA 70511-0700
(318) 893-5973
ATTORNEYS FOR DEFENDANT,
INDUSTRIAL HELICOPTERS, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served the foregoing pleading on all counsel of record herein by depositing a copy of same in the United States Mail, postage prepaid and properly addressed.

Abbeville, Louisiana, this 8th day of Nov., 1991.

/s/ Charles R. Sonnier

CHARLES R. SONNIER

APPENDIX D

The Supreme Court of the State of Louisiana

MICHAEL J. GREEN,
UNITED STATES FIDELITY & GUARANTY CO.

VS. No. 91-C - 0859

INDUSTRIAL HELICOPTERS INC. AND
DOUG WRIGHT

— — — — — —

IN RE: United States Fid/Gty. Co.; - Third Party(ies); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Third Circuit, Number CA88-1365; Parish of Lafayette 15th Judicial District Court Div. "J" Number 857722

— — — — — —

May 17, 1991

GRANTED. (See Order.) Consolidated with 91-C-0860

LHC

PFC

WFM

JLD

JCW

HTL

PH

Supreme Court of Louisiana
May 17, 1991

/s/ Illegible

Clerk of Court
For the Court

MAY 20 1991

The Supeme Court of the State of Louisiana

MICHAEL J. GREEN, et al

VS.

NO. 91-C-0859
(c/w 91-C-0860)

INDUSTRIAL HELICOPTERS, INC.,

In re. United States Fidelity & Guaranty Co. **applying for Writ of** Certiorari and /or Review **No.** 85772 **on the docket of the** 15th Judicial **District Court for the Parish of** Lafayette, and **No.** CA88-1365 **on the docket of the Court of Appeal,** Third **Circuit, State of Louisiana.**

And, whereas, the Court has this date, pursuant to Article 5, Section 5, of the Constitution of Louisiana, made and issued the following order, to-wit — "It is ordered that the writ of review issue; that the District Court and the Court of Appeal send up the record in duplicate of the case; and that counsel for all parties be notified."

Now, therefore, the said District Court and the Court of Appeal is hereby commanded, in the name of the State of Louisiana and of this Honorable Court, to send up forthwith to this Court, at the City of New Orleans, the record in duplicate of the above entitled case.

Witness the Honorable Justices of the Supreme Court of the State of Louisiana, on this 17th day of May, in the year of Our Lord, One Thousand, Nine Hundred and Ninety-One.

/s/ Frans J. Labranche, Jr.

Frans J. Labranche, Jr.
Clerk of Court

MAY 20 1991

APPENDIX E

IN THE
SUPREME COURT OF LOUISIANA

NUMBER: 91-C-0860

MICHAEL J. GREEN
Applicant-Plaintiff

UNITED STATES FIDELTIY
& GUARANTY COMPANY
Applicant-Intervenor

VERSUS

INDUSTRIAL HELICOPTERS, INC.
Respondent-Defendant

OPPOSITION TO PLAINTIFF'S AND
INTERVENOR'S APPLICATION
FOR WRIT OF CERTIORARI ON BEHALF OF
INDUSTRIAL HELICOPTERS, INC.

CHARLES R. SONNIER # 12260
FRED W. DAVIS # 1817
SONNIER, HEBERT & HEBERT
Two South Magdalen Square
P. O. Drawer 700
Abbeville, La 70511-0700
(318) 893-5973
ATTORNEYS FOR
INDUSTRIAL HELICOPTERS, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

GENERAL RESPONSE TO WRIT APPLICATIONS OF PLAINTIFF AND INTERVENOR 1

RESPONSE TO PLAINTIFF'S ASSIGNMENT OF ERROR I 3

RESPONSE TO PLAINTIFF'S ASSIGNMENT OF ERROR II 10

RESPONSE TO PLAINTIFF'S ASSIGNMENT OF ERROR III 12

RESPONSE TO PLAINTIFF'S ASSIGNMENT OF ERROR IV 12

RESPONSE TO INTERVENOR'S ASSIGNMENT OF ERROR I 13

RESPONSE TO INTERVENOR'S ASSIGNMENT OF ERROR II 13

RESPONSE TO INTERVENOR'S ASSIGNMENT OF ERROR III 13

CONCLUSION 15

CERTIFICATE OF MAILING 17

STATUTES

FEDERAL

28 USC Sec. 1333 4

LOUISIANA

L.R.S. 13:4231 1

Louisiana Civil Code Article 2317 3

Louisiana Code of Civil Procedure Article 927 1

OTHER AUTHORITY

Louisiana Code of Evidence Rule 202 (A) 10

Louisiana Code of Evidence Rule 202 (B) (1) (f) 10,11

CASES

Bordelon v. T.L. James & Co., 380 So.2d 226 (La. App. 3rd Cir. 1980) 4

Duhon vs. Petroleum Helicopters, Inc., 554 So.2d 1270 (La. App. 3d Cir. 1989), *rehearing denied, writ denied*, 559 So.2d 1360 (La. 1990) 1,2,3,4,5,7,8,9,10,11,13

Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249, 93 S.Ct. 493 (1972) 4,6,7

Freeport Sulphur Company v. S. S. Hemosia, 526 F. 2d 300 (5th Cir. 1976) 5

CASES (continued)

Green vs. Industrial Helicopters, Inc., 560 So.2d 684 (La. App. 3rd Cir. 1990) *rehearing denied, writ granted*, remand for *en banc*, 567 So.2d 1107 (La. 1990) 1,2,3,4,6,7,9,10,11,13,14,15

Hebert v. Diamond M. Company, 367 So. 2d 1210 (La. App. 1st Cir. 1978) 5

Higginbotham v. Mobil Oil Corp., 357 F.Supp. 1164 (W.D.La. 1973), supp. op. 360 F.Supp. 1140 (W.D.La. 1973), affirm'd in part, reversed in part 545 F.2d 422 (5th Cir. 1974) 4

Ledoux v. Petroleum Helicopters, Inc., 609 F.2d 824 (5th Cir. 1980), *rehearing denied* 612 F.2d 579 4

Louisiana Business College v. Crump, 474 So.2d 1365 (La. App. 2d Cir. 1985) 1

Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 106 S.Ct. 2485, (1986) 5,8

Olsen v. Shell Oil Co., 365 So.2d 1285 (La. 1978) 5

State of Louisiana ex rel Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985) 5

GENERAL RESPONSE TO WRIT APPLICATIONS OF PLAINTIFF AND INTERVENOR

The Application for Writ of Certiorari filed by the Plaintiff and Intervenor in this matter should be denied for several reasons and each Assignment of Error will be specifically addressed. Your Respondent in this Writ, INDUSTRIAL HELICOPTERS, INC., however, considers it necessary to make a general opposition and objection to the Writ Application, based on principles of procedure and substantive law.

The Applicants seek relief from the Court for matters already considered in a previous writ application and therefore, this Application should be denied. It is in fact precluded, by the principle of res judicata as per Louisiana Code of Civil Procedure Article 927 and L.R.S. 13:4231. Res judicata bars the relitigation of the object of a judgment when there is identity of the thing demanded, the same cause of action and the same parties appearing in the same quality. *Louisiana Business College v. Crump*, 474 So.2d 1365 (La. App. 2d Cir. 1985).

Pursuant to INDUSTRIAL HELICOPTERS' Writ Application of June 20, 1990, the Supreme Court granted writs on October 19, 1990 and remanded the case to the Third Circuit Court of Appeals, *En Banc*, to consider the cases of *Duhon vs. Petroleum Helicopters, Inc.*, 554 So.2d 1270 (La. App. 3d Cir. 1989), *rehearing denied, writ denied*, 559 So.2d 1360 (La. 1990) and the case of *Green vs. Industrial Helicopters, Inc.*, 560 So.2d 684 (La. App. 3rd Cir. 1990) *rehearing denied, writ granted*, remand for *en banc*, 567 So.2d 1107 (La. 1990), to compare the decisions and determine whether the *Green* decision was in conflict with the *Duhon* decision and, if so, which decision was correct. The response of the present Applicants to the June 20,

1990 writ included the very issues raised in this application.

The Application now filed with this Court should not be considered because for all practical purposes, the *Duhon* decision was decided by this Court by the denial of the writs in that case. Conversely, the *Green* decision was also decided by this Court with the granting of the June 20, 1990 writ of Industrial Helicopters and the subsequent *en banc* decision of the Third Circuit finding *Green* in conflict with *Duhon* and that *Duhon* should be the controlling, correct and applicable law in Louisiana.

The Third Circuit, pursuant to the directive of the Supreme Court, has also determined the merits of the case and not only ruled that the *Duhon* decision is the correct decision and that *Green* was in conflict with it, but also reversed the trial court in the *Green* case. *A fortiori*, if this Court has already denied writs in the *Duhon* decision, previously granted writs in this case with identical issues, and the Third Circuit, *en banc*, under directive from the Supreme Court, has already agreed that the *Duhon* decision is the correct legal principle to determine the issues in this case, the application for this writ is procedural error.

Similarly, and by the same principle, any intimation that Respondent-Defendant failed to timely raise a pre-emption defense and/or waived its right to appeal by invoking a procedure to terminate legal interest is a moot issue. The pre-emption and waiver matters have been considered by the original panel of the Third Circuit, this Honorable Court, and the Third Circuit, *en banc*, respectively. The last two panels' decisions, going to the merits of the issues, serve to nullify any legal argument regarding the failure to claim pre-emption defenses or the waiver of the right to appeal. These panels had the issue briefed before them and

their silence on these issues coupled with a decision on the merits, renders these complaints moot and the application should be denied on this basis as well.

This general objection should serve as ample support to deny the Writ Application and let the Third Circuit's *en banc* decision stand. However, Respondents, out of caution, must necessarily oppose the specific Assignments of Error in Plaintiff's Application and where applicable differentiate Intervenor's Application as well.

PLAINTIFF'S ASSIGNMENT OF ERROR I

I. **THE COURT OF APPEALS ERRED IN APPLYING MARITIME LAW TO THE EXCLUSION OF THE LAW OF THE STATE OF LOUISIANA IN THIS MATTER.**

RESPONSE TO PLAINTIFF'S ASSIGNMENT OF ERROR I

The Third Circuit's decision in *Green, en banc*, that the general maritime law precludes the use of Louisiana Civil Code Article 2317 strict liability is correct. Plaintiff-Applicant's contention that it was error to apply maritime law flies in the face of more than two hundred years of constitutional statutory and jurisprudential authority. Significant state interest can be a valid relevant concern, but not in this case. In the case where maritime law is the primary substantive law and state law specifically contradicts the principles of maritime law, state interests must fail.

Duhon recognized this. So did the *en banc* panel in *Green*.

The citizenship of the litigants is irrelevant when maritime law is the controlling substantive law and state law contradicts the general maritime law as it does here.

The *Green* case involved essentially a maritime accident in offshore waters, which should be governed by the general maritime law regardless of state citizenship. Under the general maritime law, proof of negligence is required but there is no corresponding theory of strict liability under such law. Article 2317, however, deals exclusively with strict liability and requires no proof of negligence. The substantive law conflict requires that general maritime law pre-empt 2317. There can be instances when state law supplements the general maritime law. This, however, is not one of them since there is a conflict. Since helicopters perform traditional maritime activities, claims against the vessel (helicopter) owner are controlled by the precepts of unseaworthiness. Such precepts, rooted in negligence, are dispositive of a passenger's claim against a common carrier for damages and not strict liability.

Duhon and *Green* now hold that maritime law requires an injured passenger to prove negligence in order to recover from a common carrier because the general maritime law prevails over the state's strict liability remedy for damages caused by a thing in custody, which would not require proof of negligence. These rulings should not be disturbed. The Third Circuit is now united in its decision on this issue.

The facts of the *Green* case are indistinguishable from *Duhon*. We contend the facts give rise to an action under maritime law even if such claim is not affirmatively asserted in the plaintiff's petition. (We hasten to repeat that Plaintiff asked for relief under all applicable *Federal* or Louisiana Statutes [Emphasis added]).

The jurisprudence supports INDUSTRIAL HELICOPTERS' contention that the *Duhon* holding, and the reasoning therein, adopted by *Green* almost verbatim, should control.

Claims arising from an aircraft accident are cognizable in admiralty if the wrong sued upon satisfies maritime locale requirements and bears a significant relationship to traditional maritime activity. *Executive Jet Aviation, Inc. v. Cleveland,* 409 U.S. 249, 93 S.Ct. 493 (1972).

The crash of a helicopter while it is being used in place of a vesel to ferry personnel and supplies to and from an offshore drilling structure, bears a significant relationship to traditional maritime activities which supports admiralty jurisdiction under the "savings to suitors" clause, 28 USC Sec. 1333. *Ledoux v. Petroleum Helicopters, Inc.,* 609 F.2d 824 (5th Cir. 1980), *rehearing denied* 612 F.2d 579.

Admiralty jurisdiction is present in an action arising out of a helicopter crash into the high seas in the Gulf of Mexico outside the boundaries of the state, where the helicopter performs the ordinary functions of a crewboat, ferrying workers from offshore rigs to the mainland. *Higginbotham v. Mobil Oil Corp.,* 357 F.Supp. 1164 (W.D.La. 1973), supp. op. 360 F.Supp. 1140 (W.D.La. 1973), affirmed in part, and reversed in part on other grounds 545 F.2d 422 (5th Cir. 1974).

Bordelon v. T.L. James & Co., 380 So.2d 226 (La. App. 3rd Cir. 1980), held that a state court hearing a case within a federal admiralty jurisdiction pursuant to the "savings to suitors" clause is required to apply substantive admiralty or maritime law if the claim is cognizable in admiralty.

A helicopter ferrying passengers from shore to an artificial island is engaged in a function traditionally performed by water-borne vessels, and if it is involved in an accident on the high seas, admiralty jurisdiction is invoked. *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 106 S.Ct. 2485 (1986).

Where plaintiffs are in a state court seeking a remedy for a wrong, and the remedy sought under state law alters or conflicts with the maritime or admiralty law which establishes the substantive rights of the parties, then the federal substantive maritime or admiralty law controls, *Hebert v. Diamond M. Company,* 367 So.2d 1210 (La. App. 1st Cir. 1978); *Freeport Sulphur Company v. S. S. Hemosia,* 526 F.2d 300 (5th Cir. 1976); *State of Louisiana ex rel Guste v. M/V Testbank,* 752 F.2d 1019 (5th Cir. 1985). State law may apply on injuries on the outer continental shelf as per *Olsen v. Shell Oil Co.,* 365 So.2d 1285 (La. 1978). However, this is not the case here. Green was injured in offshore waters, in an area not governed by the Outer Continental Shelf Lands Act (OCSLA).

In Plaintiff's desperate attempt to find case law to somehow convince this Court that the above jurisprudential authority, along with the *Duhon* decision, can be overturned, he makes citations to certain cases which are unpersuasive and misleading. The factual relevance of the cited cases are lacking any foundation or connection to the *Duhon* and *Green* facts. In an effort to correct Plaintiff's misapplied references, your Respondent will briefly summarize and distinguish them. Each and every case cited by Plaintiff lacks the critical aspects set forth in the above jurisprudence with regard to maritime locale and traditional maritime activity and the long-standing principle that state law cannot supplement maritime law if a conflict between the two exists.

To facilitate ease of reading our comments, we have taken the liberty to cite the reference cases by footnote.

In *Truehart*[1], cited for the proposition that 2317 is not precluded, Plaintiff neglects to mention that that cae was an insurance liability case and involved the application of State Insurance Law principles in a wrongful death action. In *Gauthier*[2], cited for the same proposition, the claimant was loading tools used in offshore drilling onto a tugboat and was injured on the dock and sued the owner of the dock for a defective dock. These cases have no relevant relation to the work activity being conducted by Mr. Green.

In *Powell*[3], Plaintiff omits the equally critical portion of the decision which holds that state law may supplement maritime law, but **state law may not conflict with federal maritime law.**

The *Baggett*[4], case was a personal injury claim based on assault and battery due to a fight aboard a vessel. Louisiana law did not provide punitive damages so the federal court did not. Again this is not relevant to the case before this Court.

In the two cases cited by Plaintiff in the early part of the brief trying to convince the Court that state law could be applicable, there are key elements missing which this Court should note.

---

[1] *Truehart vs. Blandon*, 884 F.2d 223 (5th Cir. 1989).

[2] *Gauthier vs. Crosby Marine*, 752 F.2d 1085 (5th Cir. 1985).

[3] Powell vs. Offshore Navigation, Inc., 644 F.2d 1063 (5th Cir. 1981).

[4] *Baggett vs. Richardson*, 473 F.2d 863 (5th Cir. 1973).

The *New York*[5] case involved a collision which occurred over land when a float plane crossed New Jersey territorial waters and collided with a City Police Department helicopter. The plane crashed into the East River. The helicopter crashed into a building in Brooklyn. This was simply a desperate attempt by the claimants in that case to allege some type of maritime locale. Following *Executive Jet, supra,* the court refused to find any maritime locale or significant relationship to traditional maritime activity. As can be seen from the facts which Plaintiff conveniently sidestepped, it is easy to see that this case has no factual relevance or relationship to the *Green* matter or the determination of its issues.

The same result occurred in the *American Home Assurance*[6] case as that involved an aircraft flying from Atlantic City, New Jersey to Block Island, New York. The court found no significant traditional maritime activity. Again this is a case when the *Executive Jet* parameters were still being tested and has little relevance to the facts of *Duhon* and *Green*.

In the *Cormier*[7] case, an oilfield labor contractor's employee was injured when he tripped over an angle iron protruding from a section of grating on a fuel dock. Plaintiff's brief failed to mention that the corporation responsible for constructing and designing the drainage pan in the grating was held responsible under Article 2317. This is more in the nature of strict products liability of a

---

[5] *New York vs. Waterfront Airways, Inc.*, 620 F.Supp. 411 (S.D.N.Y. 1985).

[6] *American Home vs. Assurance vs. U.S.*, 389 F.Supp. 657 (M.D.Pa. 1975).

[7] *Cormier vs. Gulf Oil Corp.*, 665 F.Supp. 1226 (E.D.La. 1987), aff. 857 F.2d 789.

manufacturer, which general maritime law recognizes. The facts have no direct relationship to the position of *Industrial Helicopters* in *Green*.

The citations to the Louisiana Boat Safety Act barely deserve mentioning, but for the sake of thoroughness, the *Kaiser*[8] case involved a wrongful death action from a water-skiing accident on Bayou Lacombe in the north shore of Lake Pontchartrain. It was a diversity action in federal court. The relevance of this accident to any of the concerns before this court with the *Green* decision are suspect.

Several of Plaintiff's cases actually include legal principles which support Respondent's position. In *Beverly*[9], the court stated that a state cannot defeat the uniformity of maritime law. It is precisely the uniformity issue in maritime law and the locale and maritime activity requirements which are at issue in the case before this Court. Likewise, the *Daigle*[10] case, cited for its discussion of significant state interest, states that a state's strong interest must fail when it conflicts with federal law. This case also cites *Tallentire, supra,* which helps support Respondent's arguments here and which the *Duhon* court saw fit to rely upon. In fact, Plaintiff's cites to the U.S. Supreme Court cases in general are irrelevant in light of the *Tallentire* decision which controls the facts of this case.

Even the *F & S Offshore*[11] case, which dealt with manu-

---

[8] *Kaiser vs. Travelers Ins. Co.*, 359 F.Supp. 90 (E.D.La. 1973).

[9] *Beverly vs. Action Marine Service*, 433 So.2d 139 (La. 1983).

[10] *Daigle vs. Coastal Marine*, 488 So.2d 139 (La. 1983).

[11] *F & S Offshore vs. Service Mach. & Shipbuilding*, 430 So.2d 1167 (La. App. 1st Cir. 1983).

facturing defects in an ocean towing vessel and was essesntially a redhibition action, recognized that the general maritime law can incorporate the general law of torts **when it is not inconsistent with the law of admiralty,** citing several cases therein.

Several cases cited by Plaintiff for the proposition that 2317 could be available, are distinguishable in that, they dealt with the builder or manufacturer of a dredge (*Bonura*[12]), involved a personal injury action for the negligent handling of a boat during a hunting trip (*Gasquet*[13]) and involved a deckhand on an inland tugboat (*Dean*[14]). All of these are clearly distinguishable.

If Plaintiff's "significant state interest" argument was taken to its logical conclusion, and the foundational philosophy of the maritime law, i.e., the requirement of uniformity and federal supremacy were cast aside, it would lead to unworkable and incomprehensible anomalous results. What happens if we have a Louisiana resident on a Texas based vessel who is on his way to Gulfport, Mississippi with a Louisiana crew and Alabama cargo but somewhere in the ship channel between Louisiana and Mississippi a maritime accident happens? Which state law would control? The maritime law was designed to be uniform and designed to have federal pre-emption in those situations where state law is inconsistent to guard against such problems. We believe the *Duhon* and *Green* courts realized the problematic situation where each adjacent state's interest would outweigh the concerns of uniform

---

[12] *Bonura vs. Commercial Union Ins. Co.*, 393 So.2d 1239 (La. 1981).

[13] *Gasquet vs. Commercial Union Ins. Co.*, 391 So.2d 466 (La. App. 4th Cir. 1980).

[14] *Dean vs. Lake Charles Harbor & Term. Dist.*, 496 So.2d (La. App. 3d Cir. 1986).

and pre-emptive maritime law with regard to injuries on the high seas. Congress and the federal system accommodates those workers injured on the outer continental shelf by the applicability of state law to such waters. That is not the situation here, as this is a general maritime law situation and state law conflicts with the maritime substantive law.

All of Plaintiff's cases have to contend with the one overwhelming fact, that the *Duhon* decision stands for the judicial pronouncement that 2317 is inapplicable with regard to the general maritime law. Nothing cited by Plaintiff at any level of court changes the theory upon which *Duhon* is based and upon which *Green* should stand.

So plaintiff makes an incorrect statement in saying that there is no contradictory jurisprudence which would prevent the application of 2317 in a maritime environment. *Duhon* is that contradictory jurisprudence and by the denial of writs in *Duhon* by this Supreme Court, it stands as the decision which should govern this Court's denial of Writs in this matter. The facade of suggesting that the citizens of the state have the right to protect themselves under this circumstance is not a compelling reason to change that decision. The compelling reason to maintain the present case law is the philosophy of the uniformity of maritime law as well as the theory of federal pre-emption where state law conflicts with general maritime law. The Plaintiff's authority falls short on overcoming the legal principle which should govern this circumstance.

Suffice it to say, based on the above, and the lack of support by Plaintiff or at best, misapplied case law, a maritime action in state court requires the state court to apply federal law so a single uniform body of maritime law may be created. Any conflict between the state and federal law must result in federal law preempting state law if the

state law conflicts. Any "significant state interest" must be subservient to the supremacy and dictates of federal maritime law.

Since the general maritime tort law requires proof of negligence by a passenger who sues a common carrier, Civil Code Article 2317 does not require proof of negligence, thus, there is a substantive conflict affecting the rights of the parties and the maritime law, as *Duhon* and now *Green* hold, must ultimately prevail to determine those rights.

PLAINTIFF'S ASSIGNMENT OF ERROR II

II. THE COURT OF APPEALS ERRED IN APPLYING FOREIGN LAW TO THIS DISPUTE BETWEEN LOUISIANA CITIZENS IN A LOUISIANA COURT WHERE PRE-TRIAL AND INITIAL APPEAL WERE ALL PURSUED SOLELY UNDER LOUISIANA LAW.

RESPONSE TO PLAINTIFF'S ASSIGNMENT OF ERROR II

Plaintiff mischaracterizes federal maritime law as "foreign law." The "maritime law" issue is related to the supremacy of two competing laws, with conflicting substantive remedies. This is not the same as "foreign law" and should be distinguished.

Plaintiff further mischaracterizes state control over the application of maritime law. State courts are compelled to apply federal maritime law and admiralty law when it applies regardless of state legislative concerns. Substantive law is not a choice. *Forum* is the only choice.

With regard to the Plaintiff's characterization of maritime law as "foreign law," the Code of Evidence

clearly makes a differentiation when it lists foreign law and maritime law separately. See La. Code of Evidence Rule 202 (B) (1) (f). Furthermore, all of the cases cited by Plaintiff regarding foreign law dealt with **another state's law or another country's law.** There was no question of the applicability of federal maritime law involved in those cases. Thus, they are without relevance or merit.

All parties knew they were dealing with a federal maritime claim in these proceedings and any intimation otherwise cannot be supported. Green's own petition plead for relief under other applicable federal and state law.

The facts of the *Green* case clearly suggest a traditional maritime activity and under the Louisiana Code of Evidence Article 202 a court is empowered to take judicial notice of certain legal matters.

Article 202 states under Subsection A certain requirements for mandatory judicial notice of legal matters:

> "202 A. A court, whether requested to do so or not, shall take judicial notice of the laws of the United States, of every state . . . ."

Since the federal substantive maritime law is a law of the United States, the jurisprudence interpreting the law of maritime torts simply does not allow for the application of state law under Civil Code Article 2317.

Indeed, under Comment (c), under Article 202:

> "Law" includes the common law as well as statutory law thus incorporating all judicial decisions authoritative in their respective jurisdictions, and embraces decisions that interpret or apply both the common law and statutes.

Furthermore, under Article 202 (B) (1) (f) the Code of Evidence states:

> "A court shall take judicial notice of the following ... and may take judicial notice without request of a party of . . . maritime law."

Comment (d) under that Article states "Maritime Law" refers to those principles and rules of the general maritime law that are recognized by maritime nations of the world.

If a Writ is granted and/or the *en banc* decision is reversed, Article 2317 of the Louisiana Civil Code would be a significant expansion on the actions and remedies provided by general maritime law. This is not a proper basis for recovery where there is a conflict. It would also be a reversal of the *Duhon* decision which allowed the common carrier (PHI) exemption from liability.

Michael Green now seeks to accomplish what he failed to accomplish at trial. It was his case to control. It was his burden to prove negligence. It was his burden and obligation to name the manufacturer of the helicopter's governor to prove strict products liability. He now must accept the fact that he has failed to prove his case under the applicable law.

PLAINTIFF'S ASSIGNMENT OF ERROR III

III. THE COURT OF APPEALS ERRED IN REQUIRING THAT PLAINTIFF PROVE THE NON-EXISTENCE OF EMPLOYMENT WITHIN HIS PHYSICAL CAPACITIES AT A SALARY HIGHER THAN THAT WHICH HE WAS EARNING AFTER COMPLETION OF A POST-ACCIDENT VOCATIONAL RETRAINING PROGRAM.

RESPONSE TO PLAINTIFF'S ASSIGNMENT OF ERROR III

No response is necessary at this time because no future damages are relevant if there is no liability.

PLAINTIFF'S ASSIGNMENT OF ERROR IV

IV. THE COURT OF APPEALS ERRED IN FAILING TO HOLD THAT DEFENDANT HAD WAIVED ITS APPEAL BY INVOKING THE PROCEDURE TO TERMINATE THE ACCRUAL OF LEGAL INTEREST.

RESPONSE TO PLAINTIFF'S ASSIGNMENT OF ERROR IV

In an interesting twist, Plaintiff argues that what was once moot is no longer moot. The Defendant's tender of money into the registry of the Court is still moot because the liability question, in the first instance, has been finally determined.

The issue is also moot because three separate panels of judges and/or justices have made merit determinations based on issues raised on appeal by Respondent. Thus, the Courts have, by rendering such decisions, removed any consideration of the waiver of the right to appeal.

Furthermore, Plaintiff and Intervenor are estopped from raising the issue now because in earlier briefs at the original appeal they took a decidedly different approach. They stated that the accrual of interest was not suspended by Respondent-Defendant's tender because it was an invalid tender. Now they are, by inference, contending it was a valid tender which prevented Respondent from even

appealing. Furthermore, both Plaintiff and Intervenor filed an *ex parte* order unilaterally withdrawing the deposited funds, two days before Christmas, without notice or contradictory hearing based on an order before a judge different than the Judge assigned to this case.

On the original appeal, Respondent answered the appeal. Plaintiff and Intervenor sought additional monies. There is no support in the law that Respondent-Defendant should not be allowed to defend itself.

INTERVENOR'S ASSIGNMENT OF ERROR I

I. **THE THIRD CIRCUIT INCORRECTLY DECIDED *DUHON V. PETROLEUM HELICOPTERS, INC.*, 554 SO.2D 1270 (LA. APP. 3D CIR. 1989), *WRIT DENIED* 559 SO.2D 1360 (1990) AND THE RULES OF LAW EXPRESSED THEREIN SHOULD THEREFORE NOT HAVE BEEN APPLIED TO THE CASE AT BAR.**

RESPONSE TO INTERVENOR'S ASSIGNMENT OF ERROR I

See Response to Plaintiff's Assignment of Error I.

INTERVENOR'S ASSIGNMENT OF ERROR II

II. **IF THE THIRD CIRCUIT'S EN BANC DECISION ON REMAND FROM THE LOUISIANA SUPREME COURT IS UPHELD REGARDING THE APPLICABILITY OF THE RULES OF LAW ENUNCIATED IN *DUHON V. PETROLEUM HELICOPTERS, INC.*, SUPRA, THEN THE THIRD CIRCUIT SHOULD HAVE REMANDED MICHAEL**

GREEN'S CASE TO THE TRIAL COURT FOR ADDITIONAL EVIDENTIARY HEARINGS RELATIVE TO THE FEDERAL CAUSES OF ACTION.

RESPONSE TO INTERVENOR'S ASSIGNMENT OF ERROR II

Intervenor's argument here overlooks one critical factor. Michael Green had his chance to prove negligence and the trial court found he did not succeed. The Third Circuit affirmed. The issues were again briefed and obviously considered by this Court in the Respondent's writ application of June 20, 1990. *Res judicata* prevents another attempt. The Defendant simply succeeded in repelling any negligence proof and the Plaintiff and Intervenor had their opportunity and failed. No litigant should get two bites of that apple.

Furthermore, there is nothing Plaintiff or Intervenor can do evidentiary-wise now that they did not attempt at trial. Therefore, remand for additional evidence is unnecessary.

INTERVENOR'S ASSIGNMENT OF ERROR III

III. INDUSTRIAL HELICOPTERS, INC. HAS NO STANDING TO MAINTAIN ITS ARGUMENT ON FEDERAL [PEREMPTION] PRE-EMPTION OF MARITIME LAW.

RESPONSE TO INTERVENOR'S ASSIGNMENT OF ERROR III

For the reasons submitted under the general responses to the Writ Application and Response to Plain-

tiff's Assignment of Error II, Intervenor's assignment must fail.

Additionally, the waiver of the defense is now a moot issue because at least two court panels have passed on the merits of the arguments set forth by Industrial Helicopters regarding the applicability of general maritme law. The nature of the facts and circumstances of the case dictated the applicability of federal maritime law under which Plaintiff's own petition sought relief. His failure to adequately prove his case under the laws and rights plead in his petition or the parties therein named or unnamed control this matter, not pre-emption.

Plaintiff's demands were defeated because *he failed* to prove negligence, and failed to name the manufacturer of the helicopter's governor, not because Industrial Helicopters withheld or failed to raise a new matter not covered by Plaintiff's petition. Plaintiff's petition raised the matter. The facts of the case and location of the accident raised the matter. There is no element of surprise which would support Intervenor's contentions that Respondent's failure to raise pre-emption is fatal. The theory behind the affirmative defense cases cited by Intervenor do no fit in this case. Green plead negligence, offered proof of same and INDUSTRIAL HELICOPTERS successfully exonerated itself of negligence. Therefore, remand for additional evidence is unnecessary.

The standing issue is moot because the Supreme Court granted writs and the *en banc* Third Circuit made its decision. If there was a prohibitive problem with pre-emption it would have been addressed by these courts. Their silence on the issue and determination on the merits renders the issue moot.

Furthermore, Intervenor's argument regarding ERISA pre-emption is distinguishable. The pleading of ERISA as a defense removes the application of state law penalties under L.R.S. 22:657. Conversely, the facts of the *Green* case and the pleadings filed by Green himself *invoke* the application of federal maritime law. A state remedy inconsistent with federal maritime law cannot be sustained. In the insurance issue, Defendant has option to raise federal pre-emption. Maritime law, the exclusive province of the federal system if there is a conflict with state laws, renders the pre-emption argument irrelevant because a litigant is bound by the dictates of general maritime law especially when relief is prayed for and sufficient proof is not adduced at trial. State law in conflict with federal general maritime law is not the same comparison or question as a right to diminish a state law element of damages which ERISA pre-emption provides.

Finally, Intervenor overlooks a key phrase regarding its contentions that the appeal is waived. The money was withdrawn *ex parte* and with no hearing, see Response to Plaintiff's Assignment of Error IV, *supra*. Respondent did not know of the withdrawal until after an appeal was lodged and the record transmitted to Respondent.

CONCLUSION

INDUSTRIAL HELICOPTERS, INC. contends that the Writ Application cannot be entertained because procedural mechanisms and theories already dictate that the merits of the *Green* case have been determined, and this Court has already passed on the issue.

Alternatively, the Writ should be denied because the Third Circuit has decided, once and for all, and correctly, the conflict within its circuit on this issue.

Maritime Law must be accorded its sanctity and special place when it otherwise conflicts with state law and no amount of "state interest" can overcome this circumstance.

All other pre-emption and/or waiver and/or lack of standing arguments fail of their own weight because the reviewing Courts have gotten past this point to the crux issues.

The *En Banc* decision of the Third Circuit should remain intact, reversing the trial court and exonerating Respondent-Defendant from all liability because the Plaintiff failed to produce the requisite proof to be granted the relief sought, under the substantive principles of law at issue.

Respectfully submitted,

SONNIER, HEBERT & HEBERT

BY: /s/ Charles R. Sonnier

CHARLES R. SONNIER
#12260

BY: /s/ Fred W. Davis

FRED W. DAVIS #1817
Two South Magdalen Square
P. O. Drawer 700
Abbeville, LA 70511-0700
(318) 893-5973
ATTORNEYS FOR
INDUSTRIAL
HELICOPTERS, INC.

CERTIFICATE OF MAILING

BEFORE ME, the undersigned Notary, personally came and appeared CHARLES R. SONNIER, a partner in the firm of **SONNIER, HEBERT & HEBERT**, who did declare and state that the statements made herein are true and correct to the best of his knowledge, information and belief and that a copy of this Opposition to Writ Application has this day been mailed to the Supreme Court of the State of Louisiana, the Third Circuit Court of Appeals, the Honorable Judge Don Aaron, and to all counsel of record, by placing a copy of this Opposition to Writ Application in the United States Mail, postage prepaid and properly addressed.

/s/ Charles R. Sonnier
CHARLES R. SONNIER #12260

SWORN TO AND SUBSCRIBED before me, Notary, this 24th day of April, 1991.

/s/ Fred W. Davis
NOTARY PUBLIC

APPENDIX F

NO. 88-1365

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

MARCH 13 1991

MICHAEL J. GREEN (Intervenor) &
UNITED STATES FIDELITY & GUARANTY
COMPANY

Plaintiffs - Appellants

VERSUS

INDUSTRIAL HELICOPTERS, INC.
& DOUG WRIGHT

Defendants - Appellees

On remand from the Supreme Court of Louisiana.

EN BANC

This case was remanded to us with orders to hold an en banc hearing and determine whether the decision is in conflict with *Duhon v. Petroleum Helicopters, Inc.*, 554 So. 2d 1270 (La. App. 3d Cir. 1989), writ denied, 559 So. 2d 1360 (La. 1990), and if so, determine which view is correct.

An en banc hearing has been held. The majority of this court concludes that the decisions are in conflict. The conflict lies in the views taken by the two panels regarding

the application of the strict liability remedy of La. C.C. art. 2317, to a claim for personal injuries to a helicopter passenger, brought against the owner of the helicopter arising out of a crash at sea off the coast of Louisiana. In *Duhon*, this court found that the plaintiff could not recover from the helicopter owner, because the plaintiff had not proved that the owner was negligent, and because La. C.C. art. 2317 did not apply. In *Green*, this court found that the plaintiff had not proved that the helicopter owner was negligent, but that C.C. art. 2317 applied and the plaintiff could, therefore, recover from the helicopter owner.

The same majority also concludes that Duhon is the correct view. We do so for the same reasons we gave in *Duhon*, 554 So. 2d at 1276, as folows:

> The liability of PHI is controlled by the general maritime tort law. A helicopter ferrying passengers from shore to an artificial island is engaged in a function traditionally performed by waterborne vessels, and if it is involved in an accident on the high seas, admiralty jurisdiction is invoked. *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986). The plaintiffs here are in state court because of the "saving to suitors" clause of 28 U.S.C.A. § 1333. Plaintiffs are in state court seeking a remedy for a wrong, but if the remedy sought under state law alters or conflicts with the maritime or admiralty law which establishes the substantive rights of the parties, then the federal substantive admiralty or maritime law controls. *Hebert v. Diamond M. Co.,* 367 So.2d 1210 (La.App. 1st Cir.1978).
>
> [3] The question before us is whether the strict liability remedy of La.C.C. art. 2317 is available to the plaintiffs in this admiralty case.

We decide that it is not. Under La.C.C. art. 2317 and the jurisprudence interpreting it, legal fault is imposed on the custodian of a thing for damage caused by a defect in the thing, regardless of any personal negligence by the custodian. *King v. Louviere,* 543 So.2d 1327 (La.1989). The strict liability or legal fault that arises from La.C.C. art. 2317 is more than a rebuttable presumption of negligence. *Halphen v. Johns-Manville Sales Corp.,* 484 So.2d 110 (la.1986). The custodian cannot be absolved from his strict liability even if he proves that he did not know and could not have known of the unreasonable risk to others. *Id.* at 116.

[4] We have been unable to find anything in the general maritime tort law the same as La.C.C. art. 2317. The warranty of seaworthiness and the liability that attaches to the breach thereof may have some kindred features, but it is applicable only to seamen; there is no implied warranty of seaworthiness extended to passengers. *Complaint of Compagnie Generale Transatlantique,* 392 F.Supp. 973 (U.S.D.C., Puerto Rico, 1975). Instead, a carrier's duty when transporting passengers requires him to exercise a very high degree of care. *Moore-McCormack Lines, Inc. v. Russak,* 266 F.2d 573 (9th Cir. 1959). Merely because an accident occurs, however, a carrier does not become liable to a passenger. *Katz v. Cie Generale and Transatlantique,* 271 F.2d 590 (4th Cir. 1959). A passenger may recover personal injury damages only if he proves the fault or negligence of a carrier. *Counts v. Lafayette Crewboats, Inc.,* 622 F.Supp. 299 (W.D.La.1983).

[5] Since the general maritime tort law requires proof of negligence by a passenger who sues a common carrier, and La. C.C. art. 2317 does not require proof of negligence, there is a

substantive conflict affecting the rights of the parties, and the maritime law must prevail.

Although the remand order did not explicity require us to decide the *Green* appeal, we assume that that is now our duty as a matter of course.

The trial court found that Green and the intervenor had not proved that either Industrial Helicopters or its pilot were guilty of any negligence in the case. There is no clear error in these findings of fact.

For these reasons, the opinion and judgment rendered herein on April 18, 1990, is recalled and set aside. The judgment of the trial court is reversed, and the claims of the plaintiff and intervenor are dismissed. Plaintiff will pay three-fourths of the costs below and on appeal. Intervenor will pay one-fourth of the costs.

REVERSED.

NUMBER 88-1365

COURT OF APPEAL, THIRD CIRCUIT

MAR 13 1991

MICHAEL J. GREEN & UNITED
STATES FIDELITY & GUARANTY COMPANY

Plaintiffs - Appellants

VERSUS

INDUSTRIAL HELICOPTERS, INC.
& DOUG WRIGHT

Defendants - Appellees

STOKER, Judge, dissenting

I dissent for the reasons assigned by Laborde, J.

NUMBER 88-1365

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

MAR 13 1991

MICHAEL J. GREEN & UNITED STATES FIDELITY & GUARANTY COMPANY

Plaintiffs - Appellants

VERSUS

INDUSTRIAL HELICOPTERS, INC. & DOUG WRIGHT

Defendants - Appellees

On remand from the Supreme Court of Louisiana.

LABORDE, J., dissents and assigns reasons.

LABORDE, Judge, dissenting.

As I believe that this court reached the correct result in the decision reported at 560 So.2d 684 (La. App. 3d Cir. 1990), I respectfully dissent from the majority opinion.

A-74

NUMBER 88-1365

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

MAR 13 1991

MICHAEL J. GREEN (Intervenor) &
UNITED STATES FIDELITY
& GUARANTY COMPANY

Plaintiffs - Appellants

Versus

INDUSTRIAL HELICOPTERS, INC.
& DOUG WRIGHT

Defendants - Appellees

On remand from the Supreme Court of Louisiana.

KNOLL, Judge, dissenting.

I respectfully dissent. In my view, plaintiff is entitled to the remedy of strict liability provided by LSA-C.C. Art. 2317; therefore, I find our earlier decision of this case correctly decided.

APPENDIX G

THE SUPREME COURT OF THE STATE OF LOUISIANA

MICHAEL J. GREEN,
UNITED STATES FIDELITY & GUARANTY CO.

VS. NO. 90-C - 1403

INDUSTRIAL HELICOPTERS INC. AND
DOUG WRIGHT

— — — — — —

IN RE: Industrial Helicopters; - Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Third Circuit, number CA88-1365; Parish of Lafayette 15th Judicial District Court Div."J" Number 857722

— — — — — —

October 19, 1990

Granted. The case is remanded to the Third Circuit Court of Appeal. The Third Circuit is ordered to hold an en banc hearing and determine whether this decision is in conflict with Duhon v. Petroleum Helicopters, Inc., 554 So.2d 1270 (La. App. 3rd Cir. 1989), and if so to determine which view is correct.

LFC

PFC

WFM

JLD

HTL

PH

WATSON, J., concurs in the remand and assigns reasons.

Supreme Court of Louisiana
October 19, 1990

/s/ Illegible

Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA

NO. 90-C-1403

MICHAEL J. GREEN

versus

INDUSTRIAL HELICOPTERS, INC.

WATSON, Justice, Concurring in the Remand:

In my view, remand of this matter does not imply that *Duhon v. Petroleum Helicopters, Inc.*, 554 So.2d 1270 (La.App. 3rd Cir. 1989), *writ denied*, 559 So.2d 1360 (La. 1990), was corrctly decided.

When there is a death on the high seas, the Death on the High Seas Act (DOHSA) preempts any conflicting state law. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986). There is a distinction between a pilot, who is performing a maritime transportation function, and a platform worker/plane passenger. See *Smith v. Pan Air Corp.*, 684 F.2d 1102 (5th Cir. 1982). The federal courts do not have exclusive jurisdiction over personal injuries on the outer continental shelf. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981). Strict liability under Louisiana's codal law applies to injuries on the outer continental shelf off the shores of Louisiana. *Olsen v. Shell Oil Company*, 365 So.2d 1285 (La. 1978)

The instant case, *Green v. Industrial Helicopters, Inc.*, appears to have reached a correct resolution. LSA-C.C. art. 2317 applies to injuries received on the outer continental shelf off the coast of Louisiana.

I respectfully concur in the remand.

91-1859

NO. (3)

Supreme Court, U.S.
FILED
MAY 19 1992
OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1991

INDUSTRIAL HELICOPTERS, INC.
Defendant-Petitioner

VERSUS

MICHAEL J. GREEN
Plaintiff-Respondent

UNITED STATES FIDELITY
& GUARANTY COMPANY
Plaintiff-intervenor/
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

APPENDIX VOLUME II

CHARLES R. SONNIER #12260
SONNIER, HEBERT & HEBERT
Two South Magdalen Square
P. O. Drawer 700
Abbeville, La 70511-0700
(318) 893-5973
ATTORNEYS FOR
INDUSTRIAL HELICOPTERS, INC.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

98

APPENDIX H

SUPREME COURT OF LOUISIANA

NUMBER: 90-C-1403

MICHAEL J. GREEN
Plaintiff-Respondent

UNITED STATES FIDELITY
& GUARANTY COMPANY
Intervenor-Respondent

VERSUS

INDUSTRIAL HELICOPTERS, INC.
Defendant-Applicant

APPLICATION OF
INDUSTRIAL HELICOPTERS, INC.,
FOR WRIT OF CERTIORARI OR REVIEW
TO REVIEW THE DECISION OF THE
COURT OF APPEAL, THIRD CIRCUIT

Mr. Charles R. Sonnier
Mr. Fred W. Davis
SONNIER, HEBERT, CABES
& HEBERT
Magdalen Centre
Two South Magdalen Square
P.O. Drawer 700
Abbeville, La 70511-0700

ATTORNEYS FOR APPLICANT,
INDUSTRIAL HELICOPTERS, INC.

INDEX

PAGE

INDEX i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 2

ACTION OF THE TRIAL COURT 5

ACTION OF THE APPEALS COURT 7

THE APPEAL PROCESS AND DEPOSIT OF MONEY INTO REGISTRY OF COURT 9

ASSIGNMENT OF ERROR I - THE APPEALS COURT AND DISTRICT COURT ERRED IN APPLYING CIVIL CODE ARTICLE 2317 AND FAILING TO RULE THAT THE GENERAL MARITIME LAW PREEMPTS 2317 10

ASSIGNMENT OF ERROR II - THE APPEALS COURT ERRED IN HOLDING THAT THE DEPOSIT OF MONIES INTO THE REGISTRY OF THE COURT DID NOT SUSPEND ACCUMULATION OF LEGAL INTEREST ON THE JUDGMENT RENDERED 19

ASSIGNMENT OF ERROR III -
THE TRIAL COURT AND APPELLATE COURT ERRED IN FINDING DEFENDANT LIABLE TO PLAINTIFF 21

ASSIGNMENT OF ERROR IV -
THE TRIAL COURT AND APPELLATE COURT ERRED IN FAILING TO EXCULPATE DEFENDANT FROM LIABILITY BASED ON THE INTERVENING AND SUPERSEDING CAUSE THAT PLAINTIFF'S INJURIES OCCURRED ON THE EXXON RESCUE CAPSULE NOT AS A RESULT ON THE HELICOPTER LANDING 22

ASSIGNMENT OF ERROR V -
THE TRIAL COURT AND APPELLATE COURT ERRED IN NOT AWARDING JUDGMENT IN FAVOR OF DEFENDANT ABSOLVING IT FROM ALL LIABILITY TO PLAINTIFF, BECAUSE THE SUDDEN OCCURRENCE OR EMERGENCY DOCTRINE WAS BOTH APPLICABLE AND PROVEN AT TRIAL 23

ASSIGNMENT OF ERROR VI-
THE TRIAL COURT AND APPELLATE COURT ERRED IN AWARDING GENERAL DAMAGES IN THE AMOUNT OF $40,000.00 AND FUTURE MEDICALS IN THE AMOUNT OF $15,000.00 24

ASSIGNMENT OF ERROR VII -
THE APPEALS COURT ERRED IN INCEASING THE TRIAL COURT'S AWARD OF PAST COST WAGES 25

CONCLUSION 26

AFFIDAVIT AND CERTIFICATE OF MAILING . . 27

PETITIONS, ANSWERS AND OTHER RELEVANT TRIAL COURT PLEADINGS

1. Petition for Damages filed by Michael J. Green 28

2. Petition of Intervention filed by United States Fidelity & Guaranty Company (USF&G) 34

3. Answer to Petition filed by Doug Wright and Industrial Helicopters, Inc. 38

4. Answer to Petition of Intervention filed by Doug Wright and Industrial Helicopters, Inc. 40

5. Amended Petition of Intervention filed by USF&G 42

6. Pre-trial Memorandum filed by defendants, Doug Wright and Industrial Helicopters, Inc. 43

7. Intervenor's Pre-Trial Memorandum filed by USF&G 46

8. Plaintiff's Pre-Trial Memorandum filed by Michael J. Green 52

9. Plaintiff's Post-Trial Memorandum filed by Michael J. Green 58

10. Defendants' Post-trial Brief filed by Doug Wright and Industrial Helicopters, Inc. 69

11. Plaintiff's Response Memorandum filed by Michael J. Green 94

12. Reasons for Judgment in Trial Court 102

13. Judgment of Trial Court 110

14. Petition for Devolutive Appeal Filed by USF&G 112

15. Petition for Appeal filed by Michael J. Green 114

16. Motion and Order for Deposit of Money Into Registry of Court and Cancellation of Judgment filed by Industrial Helicopters, Inc. 116

17. Joint Motion and Order to Withdraw Proceeds from the Registry of the Court filed by Plaintiff and Intervenor 125

PLEADINGS FILED IN COURT OF APPEAL

18. Answer to Appeal filed by Industrial Helicopters, Inc. 128

19. Original Brief on behalf of Plaintiff/Appellant, Michael Green 130

20. Original Brief on behalf of Intervenor/Appellant, USF&G 152

21. Original Brief on behalf of Appellee, Industrial Helicopters, Inc. 167

22. Reply Brief on behalf of Appellant, Michael Green 188

23. Opinion - Court of Appeal, Third Circuit 199

24. Application for Rehearing on behalf of Appellee, Industrial Helicopters, Inc 210

25. Opposition to Application for Rehearing on behalf of Plaintiff/Appellant, Michael J. Green 217

26. Denial of Rehearing by Appeals Court 222

TABLE OF AUTHORITIES

STATUTORY LAW

Louisiana Civil Code Article 2315 2

Louisiana Civil Code Article 2317 2,5,7,10,11,13-17

Louisiana Code of Evidence Article 202 13

Louisiana Code of Evidence Article 202 (B) (1) (f) 14

28 USC Sec. 1333 12,15

33 USC Sec. 905(b) 2

33 USC Sec. 905, 933 and 953 3

CASE LAW

Bordelon v. T.L.James & Co., 380 So.2d 226 (La. App. 3rd Cir. 1980) 12

Brooks v. Chicola, 514 So.2d 7, (La. 1987) 13

Duhon v. Petroleum Helicopters, Inc., 554 So.2d 1270 (La. App. 3rd Cir. 1989), *rehearing denied* 1,8,10,17,26

Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249, 93 S. Ct. 493 (1972) 11

Freeport Sulphur Co. v. S.S. Hermosia, 526 F.2d 300 (5th Cir. 1976) 12

Gagnet v. Zoummo, 487 So.2d 721 (La. App. 5th Cir. 1986) 19

Hebert v. Diamond M. Co., 367 So.2d 1210 (La. App. 1st Cir. 1978) 12

Higginbotham v. Mobil Oil Corp., 357 F.Supp 1164 (W.D.La. 1973), supp. op. 360 F.Supp. 1140 (W.D.La. 1973), affirmed in part, and reversed in part on other grounds 545 F.2d 422 (5th Cir. 1974) . 12

LaGraize v. Bickham, 391 So.2d 1185 (La. App. 4th Cir. 1980) 7,19,20

Ledoux v. Petroleum Helicopters, Inc., 609 F.2d 824 (5th Cir. 1980), *rehearing denied* 612 F.2d 579 12

Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 106 S.Ct. 2485, (1986) 12

State of La. ex rel Guste v. M.V. Testbank, 752 F.2d 1019 (5th Cir. 1985) 12

Steel and Metal Co. v. Hartford Fire Ins. Co., 376 F.Supp. 763 (D.C. Conn. 1974) 12

INTRODUCTION

INDUSTRIAL HELICOPTERS, INC. files this application to the Supreme Court for a writ of certiorari based on a legal anomaly which presently exists in the Third Circuit Court of Appeals. Two separate panels of the Third Circuit, in the instant case of Michael Green vs. Industrial Helicopters and in a previous decision of *Duhon v. Petroleum Helicopters, Inc.*, 554 So.2d 1270 (La. App. 3rd Cir. 1989), *rehearing denied*, came to different legal conclusions and application of law where there was no significant distinction between the facts of either case and, furthermore, the facts of each were completely analogous.

We request that the Court give serious consideration to our application which is primarily based on Assignment of Error No. I, however, other assignments have been preserved in accordance with court rules should further briefing be required.

STATEMENT OF THE CASE

MICHAEL GREEN filed suit against INDUSTRIAL HELICOPTERS and DOUG WRIGHT seeking numerous items of damages.

The petition filed just under one year from the date of the accident, November 26, 1984, (but not served on Industrial Helicopters until November 1985) alleged that GREEN was employed by Southern Petroleum Laboratories, Inc. (SPL) which had engaged the services of Industrial Helicopters "as an air taxi for transportation from Milton, Louisiana to Aminoil platform at High Island 561 and High Island 309", approximately 90 miles offshore. SPL was and is engged in oil and gas production service business. GREEN sought his damages under a theory

of negligence including the individual negligence of the pilot, Doug Wright, and the negligence of Industrial Helicopters under Civil Code Article 2315. He also claimed in his petition that Industrial Helicopters was responsible on the basis of strict liability for the defects existing in the helicopter pursuant to Article 2317 of the Louisiana Civil Code and "other applicable Federal or Louisiana statutes" (emphasis ours). He also asserted claims under the theory of res ipsa loquitur. Plaintiff initially sought over $870,000.00 in damages.

United States Fidelity and Guaranty Company (USF&G) was the workmen's compensation insurer of Southern Petroleum Laboratories. They filed a petition for intervention seeking reimbursement for medical payments and workmen's compensation payments made to GREEN, as a consequence of the accident. Although the suit was initially filed claiming a right under the Louisiana Compensation Act, they later amended the petition for intervention stating, significantly for this writ application, USF&G's payments were under the *Federal* Longshoreman's and Harbor Worker's Act (LHWCA).

The LHWCA nature of the compensation was also confirmed by testimony at court and by intervenor's pretrial memorandum. The LHWCA is applicable to maritime related injuries. 33 USC Sec. 905(b).

The intervenor's pleadings clearly indicate that the intervention and compensation is based on 33 USC Sec 905, 933 and 953 giving a maritime related employee the right to file suit against a third party tortfeasor for injuries sustained in a work related accident, if the third party is not otherwise immune from tort liability by other provisions of the LHWCA.

GREEN's claims are based on the following facts.

He was employed by SPL as a gas meter instrument technician, when on November 26, 1984, he was riding as a passenger in a helicopter operated by Doug Wright and owned by INDUSTRIAL HELICOPTERS. He was being transported to an offshore oil platform in the Gulf 90 miles from the Louisiana coast. The helicopter suddenly and with very little warning lost engine power, caused by mechanical failure of the helicopter's governor mechanism, and descended into the Gulf of Mexico. During the time of descent into the Gulf, the pilot had ample opportunity to instruct passenger GREEN to prepare for the landing on the water. The pilot maneuvered the helicopter to where the craft landed softly on its pontoons. The FAA called the accident an "incident". Shortly thereafter a rescue capsule operated by Exxon personnel from an adjacent oil platform, was sent to the floating and disabled helicopter. At that time, there was no apparent or expressed physical impairment by GREEN. The helicopter sank before being able to be retrieved. Testimony indicated that GREEN may have hit his head on the Exxon rescue capsule while being rescued. He also claimed he suffered injuries as a result of the helicopter impacting the water.

Industrial Helicopters had implemented an extensive and thorough maintenance schedule on all of its equipment and helicopters, including the one which unexpectedly descended into the ocean. The helicopter's governor mechanism was a sealed unit which could not be maintained or visibly inspected by INDUSTRIAL HELICOPTERS.

For three and a half (3 1/2) years from December, 1984, GREEN engaged numerous medical professionals seeking evaluation and assistance for his alleged injuries. Dr. Michael Heard, orthopedic surgeon, had released GREEN to return to his regular work without restriction.

GREEN continued to do light duty work for SPL until May, 1985. By August of 1985, Dr. Thomas Laborde, a specialist in physical medicine and rehabilitation, found that he could not do anything more for Mr. GREEN. Dr. Randolph Malloy treated GREEN's alleged TMJ problem such that GREEN's condition was improved by the end of 1987.

Plaintiff had a pre-existing TMJ problem verified by Dr. Barrios. He also was involved in an automobile accident in December, 1987 which rendered him unconscious.

After GREEN was no longer employed for SPL, he received training in electronics and obtained employment with MASCO at an hourly rate of $1.30 less than what he had been earning prior to the alleged injuries.

ACTION OF THE TRIAL COURT

By judge trial on May 3 and 4, 1988, the Trial Court found defendant, INDUSTRIAL HELICOPTERS, liable to GREEN only under a theory of strict liability. Judgment of the Court awarded $40,000.00 in general damages, $25,000.00 for past and future economic damages, $18,747.75 in past medical expenses and $15,000.00 for future medical expenses for a total amount of $98,747.75 with legal interest from date of judicial demand, November 25, 1985. The Court further found judgment in favor of USF&G, the workers compensation intervenor, in the amount of $43,747.75 in workers compensation benefits and medicals paid to MICHAEL GREEN.

The Court also found in favor of Doug Wright and against MICHAEL GREEN and USF&G dismissing GREEN's claim against Wright. The Trial Court cast INDUSTRIAL HELICOPTERS with 2/3 of the costs and

MICHAEL GREEN with 1/3 of the costs.

The trial judge specifically found that neither INDUSTRIAL HELICOPTERS nor Doug Wright were liable under any theory of negligence. The Court found that Wright's "handling of the emergency situation was extraordinary" and found no pilot error. It further found that INDUSTRIAL HELICOPTERS was not negligent in the maintenance or inspection of its helicopters and that it was not possible for the defendant to have discovered the defective governor. In the opinion of the Trial Court, the plaintiff failed to prove any negligence of INDUSTRIAL HELICOPTERS in the care and operation of its helicopter. INDUSTRIAL HELICOPTERS was nonetheless held liable for any damages caused by a defective thing in its care, custody or control under Louisiana Civil Code Article 2317.

The Court determined the sole and proximate cause of the crash to be the engine failure caused by the mechanical failure of the craft's governor. The governor had to be sent to a special facility for maintenance and was not subject to internal inspection or maintenance by INDUSTRIAL HELICOPTERS as it was a sealed unit which could not be maintained by INDUSTRIAL HELICOPTERS and which mechanics' could not visibly inspect.

ACTION OF THE APPEALS COURT

The Court of Appeals affirmed and amended the Trial Court's decision.

The Appeals Court increased the plaintiff's past lost wages award to $66,400.00 and eliminated any award made for future lost wages (loss of earning capacity), thus in-

creasing plaintiff's total award to $140,147.75.

The Appeals Court amended the Trial Court's judgment to allow intervenor full recovery of USF&G's intervention of $66,485.38.

The Appeals Court also found plaintiff and intervenor entitled to legal interest from date of judicial demand but remanded the case to the Trial Court to hold a contradictory hearing on INDUSTRIAL HELICOPTERS' Motion for Deposit of Money Into Registry of Court and grant same only if *LaGraize v. Bickham*, 391 So.2d 1185 (La. App. 4th Cir. 1980) conditions were not met by defendant. (See The Appeal Process and Deposit of Money, infra.)

The Court agreed with the Trial Court's exculpating Wright and INDUSTRIAL HELICOPTERS from any liability under negligence. The Court did find plaintiff proved by a preponderance of the evidence that defendant, INDUSTRIAL HELICOPTERS, INC. owned the helicopter and it was in its custody, and that it was strictly liable to plaintiff based on plaintiff's proof of a defect in the helicopter which created an unreasonable risk of harm to MICHAEL GREEN. This Court agreed that the failure of the aircraft's governor caused it to lose altitude and crash. The Appeals Court found plaintiff proved defendant was strictly liable for damage plaintiff sustained under Civil Code Article 2317.

The Appeals Court found INDUSTRIAL HELICOPTERS third party fault and/or intervening cause defenses to be without merit.

It also found the Trial Court did not abuse its discretion in its award of general damages and future medical expenses.

On application for rehearing, the Appeals Court voted 2 - 1 to refuse same, however, Judge Stoker would have granted the rehearing limited to the question of whether LSA-CC Article 2317 is applicable to determine whether the Court's decision is in conflict with *Duhon v. PHI,* 554 So.2d 1270 (La. App. 3rd Cir. 1989) and if so, to determine which view is correct.

THE APPEAL PROCESS AND DEPOSIT OF MONEY INTO REGISTRY OF THE COURT

This segment is inserted in the writ application to chronologize for the Court the events surrounding the deposit of money into the Registry of the Court. We address as an assignment of error the Appeals Court's finding that legal interest should accrue from the date of judicial demand despite INDUSTRIAL HELICOPTERS' tender of money into the Court's registry.

The suspensive appeal delays related to the judgment rendered July 7, 1988 had expired. INDUSTRIAL HELICOPTERS, not wanting to risk seizure of assets, offered the judgment amount of $130,048.83 to plaintiff which was not accepted due to disagreement between plaintiff and intervenor as to how the proceeds were to be apportioned and/or the reticence of the intervenor to sign a satisfaction of judgment. Thus, plaintiff refused the tender of money leaving INDUSTRIAL HELICOPTERS the alternative of placing the money in registry of the court or suffering the risk of the judgment being executed.

By motion and order dated September 26, 1988, INDUSTRIAL HELICOPTERS deposited the judgment amount into the registry, said motion also including a

cancellation of judgment, and a request for a hearing if the court or the parties deemed it necessary. The Motion required any party desiring to withdraw the funds to file an appropriate motion and order and reserved unto all parties rights for devolutive appeals or answers of said appeals.

Plaintiff then devolutively appealed the Trial Court's judgment seeking an increase in damages. Intervenor also appealed seeking additional intervention monies. INDUSTRIAL HELICOPTERS answered the appeals seeking reversal of the Trial Court's judgment.

After the devolutive appeal was filed, the plaintiff and intevenor unilaterally withdrew the funds by formal motion and order without notice to counsel for INDUSTRIAL HELICOPTERS and without otherwise informing INDUSTRIAL HELICOPTERS.

ASSIGNMENT OF ERROR I

THE APPEALS COURT AND DISTRICT COURT ERRED IN APPLYING CIVIL CODE ARTICLE 2317 AND FAILING TO RULE THAT THE GENERAL MARITIME LAW PREEMPTS 2317

The main thrust of this writ application concerns INDUSTRIAL HELICOPTERS' contention that the Appeals Court and Trial Court erred in applying Louisiana Civil Code Article 2317, and the theory of strict liability to the facts of this case which involved essentially a maritime accident in offshore waters, which should be governed by the General Maritime Law. Under the General Maritime Law, proof of negligence is required but there is no corresponding theory of strict liability under such law. Article 2317, however, deals exclusively with strict liability and requires no proof of negligence. The substantive law

conflict requires that general maritime law preempt 2317. Both courts below committed error in not applying general maritime law and failing to exculpate defendant, INDUSTRIAL HELICOPTERS, from liability based on INDUSTRIAL HELICOPTERS' lack of negligence in operation or maintenance of the helicopter in which GREEN was traveling when the accident occurred. In its post trial brief to the Trial Court and repeated in the appeals process, Defendant asserted the need to prove negligence. Since helicopters perform traditional maritime activities, claims against the vessel (helicopter) owner are controlled by the precepts of unseaworthiness. Such precepts are dispositive of a passenger's claim for damages and not strict liability. (Defendants Post Trial Brief, p. 4-9.)

The *Green* decisions below stand in direct conflict with *Duhon v. Petroleum Helicopters, Inc.*, 554 So.2d 1270 (La. App. 3rd Cir. 1989), *rehearing denied*, which held that the State's strict liability remedy (2317) for damages caused by a thing in custody was not available to an injured helicopter passenger in an admiralty case brought in state court under the "savings to suitors" clause of the admiralty jurisdiction statute. *Duhon* further held that maritime law requiring an injured passenger to prove negligence in order to recover from a common carrier prevailed over the state's strict liability remedy for damages caused by a thing in custody, which would not require proof of negligence.

Judge Stoker of the *Green* Appeals Court panel below, on application for rehearing, would have granted a rehearing on this case on the issue of the conflict between the *Green* decision and *Duhon* and to determine which view is correct.

INDUSTRIAL HELICOPTERS contends the Supreme Court should now grant a writ herein to resolve this con-

flict within the Circuit, wherein two separate panels ruled differently on basically the same set of facts. The Supreme Court should definitively decide the issue of the general maritime preemption of Civil Code Article 2317 under facts and circumstances bearing a significant relationship to traditional maritime activities, regardless of whether a suit is brought in state court under 2317 or the suit is incepted under the "savings to suitors" clause.

Duhon is a case of first instance where Civil Code Article 2317 is said to be inapplicable to claims arising under the General Maritime Law.

The *Duhon* case was decided by the Appeals Court at the time the *Green* case was on appeal.

The facts of the *Green* case, (See Statement of Case, *supra*) are indistinguishable from *Duhon*. We contend the facts give rise to an action under maritime law even if such claim is not affirmatively asserted in the plaintiff's petition. (We hasten to repeat that Plaintiff asked for relief under all applicable *Federal* or Louisiana Statutes [emphasis added]).

The jurisprudence supports INDUSTRIAL HELICOPTERS' contention that the *Duhon* holding should also apply in *Green*.

Claims arising from an aircraft accident are cognizable in admiralty if the wrong sued upon bears a significant relationship to traditional maritime activity. *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 93 S. Ct. 493 (1972).

The crash of a helicopter while being used in place of a vessel to ferry personnel and supplies to and from an off-

shore drilling structure bears a significant relationship to traditional maritime activities to support admiralty jurisdiction under the "savings to suitors" clause, 28 USC Sec. 1333. *Ledoux v. Petroleum Helicopters, Inc.,* 609 F.2d 824 (5th Cir. 1980), *rehearing denied* 612 F.2d 579.

Admiralty jurisdiction is present in an action arising out of a helicopter crash into the high seas in the Gulf of Mexico outside the boundaries of the state, where the helicopter performs the ordinary functions of a crewboat, ferrying workers from offshore rigs to the mainland. *Higginbotham v. Mobil Oil Corp.,* 357 F.Supp 1164 (W.D.La. 1973), supp. op. 360 F.Supp. 1140 (W.D.La. 1973), affirmed in part, and reversed in part on other grounds 545 F.2d 422 (5th Cir. 1974).

Bordelon v. T.L.James & Co., 380 So.2d 226 (La. App. 3rd Cir. 1980), held that a state court hearing a case within a federal admiralty jurisdiction pursuant to the "savings to suitors" clause is required to apply substantive admiralty or maritime law if the claim is cognizable in admiralty.

28 USC 1333 preserves state court jurisdiction for common law maritime remedies and actions but it does not create federal court jurisdiction for maritime causes of action. *Steel and Metal Co. v. Hartford Fire Ins. Co.,* 376 F.Supp. 763 (D.C. Conn. 1974).

A helicopter ferrying passengers from shore to an artificial island is engaged in a function traditionally performed by waterborne vessels, and if it is involved in an accident on the high seas, admiralty jurisdiction is invoked. *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 106 S.Ct. 2485, (1986).

Where plaintiffs are in a state court seeking a remedy for a wrong, and the remedy sought under state law alters or conflicts with the maritime or admiralty law which establishes the substantive rights of the parties, then the federal substantive admiralty or maritime law controls. *Hebert v. Diamond M. Co.*, 367 So.2d 1210 (La. App. 1st Cir. 1978). *Freeport Sulphur Co. v. S.S. Hermosia*, 526 F.2d 300 (5th Cir. 1976); *State of La. ex rel Guste v. M.V. Testbank*, 752 F.2d 1019 (5th Cir. 1985).

Suffice it to say, based on the above, that a maritime action in state court requires the state court to apply federal law so a single uniform body of maritime law may be created. Any conflict between the state and federal law must result in federal law preempting state law.

The *Duhon* court recognized all of these principles in coming to their conclusions and ruling that Civil Code Article 2317 is in effect preempted by the federal substantive maritime law in those tort circumstances where general maritime law determines liability. The *Duhon* court recognized what the Appeals Court and Trial Court in *Green* did not. Since the general maritime tort law requires proof of negligence by a passenger who sues a common carrier, Civil Code Article 2317 does not require proof of negligence, thus, there is a substantive conflict affecting the rights of the parties and the maritime law must ultimately prevail to determine those rights.

Plaintiff acknowledged the maritime nature of his claim when in his brief he argued that the state court decision of *Brooks v. Chicola*, 514 So.2d 7, (La. 1987) was not applicable to federal compensation under LHWCA, although he sought to distinguish such federal cases on the basis of "the inadequate award" in his case.

The trial judge originally limited the intervenor's recovery to the plaintiff's award for economic damage and medical expenses, prohibiting recovery or reimbursement from the general damages under the authority of the state court decision for state workers compensation interventions in *Brooks v. Chicola, supra.*

The Appeals Court, however, increased the intervenor's recovery, bypassing any consideration of the *Brooks* decision or the maritime nature of the Green facts as they applied. Our point in bringing this issue before the Court now is to underline the argument that all parties knew they were dealing with a federal maritime claim in these proceedings.

To further support our argument for Supreme Court review, we contend that the facts of the *Green* case clearly suggest a traditional maritime activity and under the Louisiana Code of Evidence Article 202 a court is empowered to take judicial notice of certain legal matters.

Article 202 states under Subsection A certain requirements for mandatory judicial notice of legal matters:

> "202 A. A court, whether requested to do so or not, shall take judicial notice of the laws of the United States, of every state ...."

Since the federal substantive maritime law is a law of the United States, the jurisprudence interpreting the law of maritime torts simply does not allow for the application of state law under Civil Code Article 2317.

Indeed, under Comment (c), under Article 202:

> "Law" includes the common law as well as statutory law thus incorporating all judicial de-

> cisions authoritative in their respective jurisdictions, and embraces decisions that interpret or apply both the common law and statutes.

Furthermore, under Article 202 (B) (1) (f) the Code of Evidence states:

> "A court shall take judicial notice of the following ... and may take judicial notice without request of a party of ... maritime law."

Comment (d) under that Article states "Maritime Law" refers to those principles and rules of the general maritime law that are recognized by maritime nations of the world.

We contend *Duhon* is the appropriate pronouncement of the applicable law with regard to facts in Duhon's accident or GREEN's accident.

Defendants contend that Article 2317 of the Louisiana Civil Code is a significant expansion on the actions and remedies provided by general maritime law and is not a proper basis for GREEN's recovery and that the courts below failed to apply the general maritime law standard which required a proof of negligence. Plaintiff *GREEN* failed to prove negligence. Both lower courts noted that, in fact, Doug Wright and INDUSTRIAL HELICOPTERS were free of negligence either in maintenance or operation of the helicopter. Thus, under general maritime law, INDUSTRIAL HELICOPTERS should not be liable to MICHAEL GREEN. Therefore, the Appeals Court decision affirming the Trial Court's finding of liability should be reversed. Civil Code Article 2317 did not apply to *Duhon*. It cannot and should not apply to *Green* as a matter of law.

THE DUHON FACTS AND CASE

In order to have a better appreciation of defendant's contentions that the *Green* case is, for all practical purposes, indistinguishable from the *Duhon* facts, it is helpful to expound on the relevant and analogous facts.

Duhon was a passenger aboard a PHI helicopter involved in an accident in 1983 in offshore waters "well beyond a marine league" from the Louisiana coast. Duhon claimed personal injuries and in addition to suing other defendants, sued PHI, the owner of the aircraft.

Duhon's suit was brought pursuant to the "saving to suitors" clause, 28 USC Sec. 1333. His claims were based on strict liability under Louisiana tort law Civil Code Article 2317 and general maritime law.

Duhon was employed by Southern Petroleum Laboratories of Lafayette, Louisiana, as a meter technician. His employment required him to be transported from Lafayette to offshore oil platforms out in the Gulf well beyond the Louisiana coast. SPL had contracted with PHI to ferry SPL employees by helicopter to these locations.

The analogies to the facts of the *Green* case are extraordinarily similar down to the same company and the same job description and the same circumstances in the Gulf but they get even more similar.

In the only accident relevant in *Duhon* which is germane to the issue brought by this writ (Duhon had claimed injury resulting from two accidents), Duhon was a passenger on the PHI helicopter heading to a platform when the engine quit at an altitude of 1,000 to 1,500 feet. The pilot brought the aircraft straight down in a slow des-

cent. The FAA categorized the *Duhon* landing as an "incident" rather than a crash. The engine quit running because a blade on the gas producer rotor of the engine failed as a result of vibrator stress.

The helicopter remained afloat until a rescue vessel arrived two hours later. The rescue proceeded when Duhon jumped from the helicopter to a boat ladder and was momentarily pinned by the nose of the aircraft against the vessel. There were no apparent injuries to Duhon as a result of the emergency landing or the rescue.

The *Duhon* court found a defect in the engine of the PHI helicopter based on a power loss related to the separation of the gas producer blade, caused by metal fatigue, which caused a mechanical failure in the engine.

The trial judge in *Duhon* granted a directed verdict for the plaintiff finding, among other things, (but only relevant for our argument here) that PHI was liable to plaintiff under Civil Code Article 2317 as custodian of the aircraft.

On the above set of facts, the *Duhon* appeals court reversed the trial judge, finding liability of PHI controlled exclusively by the general maritime law under the various jurisprudence set forth above. They specifically found that the remedy under Civil Code Article 2317 was unavailable to plaintiffs in this admiralty case. We contend that Green is similarly situated as a plaintiff much in the same way Duhon was.

The *Duhon* court noted the theories underlying Civil Code Article 2317 have no corresponding theory in general maritime tort law. Especially, the custodian cannot be absolved from strict liability even if the party proves that he did not know, and could not have known of the unreason-

able risk of harm. There is no parallel theory of recovery under general maritime law for torts.

Indeed as the *Duhon* court noted:

> "There is no implied warranty of seaworthiness extended to passengers... Instead, a carrier's duty when transporting passengers requires him to exercise a very high degree of care .... [m]erely because an accident occurs, however, a carrier does not become liable to a passenger .... [A] passenger may recover personal injury damages only if he proves the fault or negligence of a carrier ... (Citations omitted)
>
> Since the general maritime tort law requires proof of negligence by a passenger who sues a common carrier, and Louisiana Civil Code Article 2317 does not require proof of negligence, there is a substantive conflict effecting the rights of the parties, and the maritime law must prevail. *Duhon* at page 1277-1278.

The *Duhon* court found pilot negligence was not at issue (the jury found no pilot error and it was not assigned as error), leaving only the consideration whether the failure of the engine was caused by any negligence on the part of PHI or whether PHI had knowledge of the engine's propensity to fail, and flew in disregard of that knowledge. (There was some evidence of similar engines failing in similar helicopters.)

The *Duhon* court found:

> Nothing PHI did in the way of maintenance or operation caused the blade to fail and there was nothing that it could have done to prevent it. Nor was there any evidence that PHI was aware that

such a problem might occur since it had not prior experience with such failures."
Duhon at pages 1277-1278.

The Court specifically found no proof, "not even of the smallest or slightest negligence against PHI," finding that the maintenance and operation did not result in any negligent conduct. (*Duhon* at pages 1277-1278.)

Significantly, the *Duhon* court did find that strict products liability law applied to the manufacturer of the engine as a viable theory of recovery against manufacturers. Duhon found that the general maritime law recognized this and that the Louisiana law of products liability was similar, thus creating no substantive law conflict in the case of products liability.

A summary of the relevant facts of the *Green* case which is the subject of the writ issue before this Court as outlined in the Statement of the Case, *supra*, and the facts of the *Duhon* case can be graphed as follows:

FACTUAL ELEMENT	DUHON	GREEN
Passenger aboard helicopter involved in accident in off-shore water	Yes	Yes
Claimant employed by SPL as meter technician	Yes	Yes
SPL contracted w/PHI or IH to ferry personnel to off-shore rigs	Yes	Yes
General Maritime Law Application	Yes	Yes

FACTUAL ELEMENT	DUHON	GREEN
Emergency helicopter landing in water called an "incident"	Yes	Yes
Helicopter engine quit running while over Gulf waters	Yes	Yes
Engine defect gas producer blade failed (mechanical failure of engine)	Yes	----
Engine defect mechanical failure of governor (sealed unit)	----	Yes
No apparent injuries to claimant	Yes	Yes
Maintenance and operation of helicopter by owner more than satisfactory (no negligence attributable to owner or pilot)	Yes	Yes
Owner of helicopter not liable under negligence	Yes	Yes
Owner of helicopter liable strict liability	No	Yes

The one glaring difference is that INDUSTRIAL HELICOPTERS (GREEN) was found liable under strict liability and PHI (Duhon) was not. It is the only substantial difference between the cases. This Court can remedy this glaring defect in application of law by granting a writ of review.

The factual analogies between *Duhon* and *Green* are overwhelming. We contend the *Green* legal result should follow *Duhon*. At present, two different panels of the Third Circuit with similar facts have decided what is essentially the same case, resulting in two opposite legal results and findings of liability. We contend the *Duhon* holding should be controlling, thus resulting in the reversal of the Appeals Court's decision in *Green*.

ASSIGNMENT OF ERROR II

THE APPEALS COURT ERRED IN HOLDING THAT THE DEPOSIT OF MONIES INTO THE REGISTRY OF THE COURT DID NOT SUSPEND ACCUMULATION OF LEGAL INTEREST ON THE JUDGMENT RENDERED

Defendant sought to terminate accumulation of legal interest on the amount of the judgment against it through the filing of a Motion and Order for Deposit of Money into Registry of the Court and Cancellation of Judgment. The Order was signed September 26, 1988 (See the Appeal Process and Deposit of Money into Registry, *supra*).

The Appeals Court, relying on *LaGraize v. Bickham*, 391 So.2d 1185 (La. App. 4th cir. 1980) and *Gagnet v. Zoummo*, 487 So.2d 721 (La. App. 5th Cir. 1986), stated that in order for INDUSTRIAL HELICOPTERS to obtain the benefit of such deposit (relief from additional interest and costs), certain conditions were required to be met. Not being able to determine whether the conditions as set forth in *LaGraize* were met, the Court remanded to the Trial Court for a contradictory hearing on the defendant's motions to instruct the trial judge to grant the motion only if the *LaGraize* conditions were met.

The *LaGraize* conditions as enunciated at pages 1190-1191 in that decision are:

1) Tender to and refusal to accept by the judgment creditor;
2) Tender and/or the deposit must be for the full amount of the judgment, including costs and interest;
3) The tender must be unconditional and constitute a complete waiver of any future defenses to liability on the part of the judgment debtor.
4) Acceptance of the tender and/or withdrawal of the funds by the judgment creditor is without prejudice to any of its rights to appeal as to quantum.
5) In the event of an increase in quantum on appeal, the judgment debtor is liable for all additional costs together with interest on the amount of the increase from the date of judicial demand until paid.

The Defendant seeks to stop the accrual of legal interest on the amounts awarded by the Trial Court and encompassing that time period between the date of the order allowing deposit of funds on September 26, 1988 until the present. The lone exception, of course, is if the Appeal Court's amendment to the trial judgment award remains, there will, of course, be judgment from date of judicial demand on that additional increase in the award.

Defendant argues that his tender of the proceeds in this matter fulfilled the *LaGraize* conditions and that a remand to the Trial Court is not necessary.

We would take issue however with the fact that such a tendering of money should not and cannot under any principle of equity or law cut off the judgment debtor's right to appeal the judgment. The deposit of the money was simply done because the plaintiff failed to accept the tender of the money and the defendant was left in a situa-

tion on where some of its assets may have been subject to seizure since the suspensive appeal delays had expired.

INDUSTRIAL HELICOPTERS would simply take issue with the fact that any such deposit of money, even if it does meet the *LaGraize* conditions cannot and should not preclude the defendant's answering the devolutive appeal taken by the plaintiff and intervenor. If legal interest is awarded from date of judicial demand, then the plaintiff, by removing the proceeds from the registry, is awarded in effect, interest on interest, assuming Plaintiff deposited funds for his own benefit once the money was withdrawn. Surely this result is not equitable. Had the money been allowed to remain in the registry of the Court, it would have continued earning interest in the clerk's account while at the same time the Defendant would have been protected from judicial execution of the assets. Instead, the plaintiff and intervenor withdraws the funds, files an appeal and also claims legal interest. To grant legal interest is indeed error.

INDUSTRIAL HELICOPTERS lists this assignment of error to preserve same should a writ be granted, and reserves further rights to brief same, if necessary.

ASSIGNMENT OF ERROR III

THE TRIAL COURT AND APPELLATE COURT ERRED IN FINDING DEFENDANT LIABLE TO PLAINTIFF.

We list this Assignment of Error to preserve our right to argue same, should the writ be granted, and hereby reserve all rights to further brief this issue at an appropriate time. We rely on that portion of our original appeals brief atached as an exhibit and entitled "Defendant-

Appellee's Assignment of Error I" to support our position that INDUSTRIAL HELICOPTERS should not have been found liable to plaintiff. This assignment is in addition to the full discussion regarding application of general maritime law argued in Assignment of Error I herein in this writ application.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT AND APPELLATE COURT ERRED IN FAILING TO EXCULPATE DEFENDANT FROM LIABILITY BASED ON THE INTERVENING AND SUPERSEDING CAUSE THAT PLAINTIFF'S INJURIES OCCURRED ON THE EXXON RESCUE CAPSULE NOT AS A RESULT OF THE HELICOPTER LANDING.

We list this Assignment of Error to preserve our right to argue same, should the writ be granted, and hereby reserve all rights to further brief this issue at an appropriate time. We rely on that portion of our original appeals brief attached as an exhibit and entitled "Defendant-Appellee's Assignment of Error II" to support our position that INDUSTRIAL HELICOPTERS should have been exculpated from liability based on intervening and superceding causes.

ASSIGNMENT OF ERROR V

THE TRIAL COURT AND APPELLATE COURT ERRED IN NOT AWARDING JUDGMENT IN FAVOR OF DEFENDANT ABSOLVING IT FROM ALL LIABILITY TO PLAINTIFF, BECAUSE THE SUDDEN OCCURRENCE OR EMERGENCY DOCTRINE WAS BOTH APPLICABALE AND PROVEN AT TRIAL.

We list this Assignment of Error to preserve our right to argue same, should the Writ be granted, and hereby reserve all rights to further brief this issue at an appropriate time. We rely on that portion of our original appeals brief attached as an exhibit and entitled "Defendant-Appellee's Assignment of Error III" to support our position that INDUSTRIAL HELICOPTERS should not have been found liable to plaintiff because of the applicability of the sudden occurrence or emergency doctrine.

ASSIGNMENT OF ERROR VI

THE TRIAL COURT AND APPELLATE COURT ERRED IN AWARDING GENERAL DAMAGES IN THE AMOUNT OF $40,000.00 AND FUTURE MEDICALS IN THE AMOUNT OF $15,000.00.

We list this Assignment of Error to preserve our right to argue same, should the writ be granted, and hereby reserve all rights to further brief this issue at an appropriate time. We rely on that portion of our original appeals brief attached as an exhibit and entitled "Defendant-Appellee's Assignment of Error IV" to additionally support our position that the trial and appeals court abused their discretion in first awarding the amount of general damages and future medicals and affirming same.

ASSIGNMENT OF ERROR VII

THE APPEALS COURT ERRED IN INCREASING THE TRIAL COURT'S AWARD OF PAST LOST WAGES.

We list this Assignment of Error to preserve our right to argue same, should the writ be granted, and hereby reserve all rights to further brief this issue at an appropriate time. We rely on that portion of our original appeals brief attached as an exhibit and entitled "Plaintiff-Appellant's Assignment of Error I and II" to additionally support our position.

CONCLUSION

In light of the foregoing, your applicant prays that the Supreme Court grant a writ of certiorari to review the results of the instant case in light of the decision reached in *Duhon vs. Petroleum Helicopters, Inc., supra*, and the other Assignments of Error indicated herein.

Respectfully submitted,

SONNIER, HEBERT, CABES
& HEBERT

BY: /s/ Charles R. Sonnier
CHARLES R. SONNIER #12260

BY: /s/ Fred W. Davis
FRED W. DAVIS #1817
Two South Magdalen Square
P. O. Drawer 700
Abbeville, LA 70511-0700
(318) 893-5973

ATTORNEYS FOR INDUSTRIAL HELICOPTERS, INC.

AFFIDAVIT AND CERTIFICATE OF MAILING

BEFORE ME, the undersigned Notary, personally came and appeared CHARLES R. SONNIER, who did declare and say that the allegations of this application are true and correct to the best of his knowledge, information and belief and that a copy of this application has this day been mailed to the Supreme Court of the State of Louisiana, the Third Circuit Court of Appeals and to all counsel of record, by placing a copy of this application in the United States Mail, properly addressed and postage prepaid.

/s/ Charles R. Sonnier
CHARLES R. SONNIER

SWORN TO AND SUBSCRIBED BEFORE ME, this 20th Day of June, 1990, at Abbeville, Louisiana.

/s/ Mary D. Ashley
NOTARY PUBLIC

APPENDIX I

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

MICHAEL J. GREEN, ETC.

No. 88-1365

v.

INDUSTRIAL
HELICOPTERS, INC., ETC

RECEIVED
MAY 23 1990

BEFORE: JUDGES FORET-STOKER-LABORDE

ORDER

The Application...for Rehearing herein having been duly considered:

IT IS ORDERED that a Rehearing be, and the same is hereby, REFUSED

Lake Charles, Louisiana, this 22ND day of May, 1990

Stoker, J., votes to grant limited to the question of whether LSA-C.C. art 2317 is applicable to determine whether our decision here is in conflict with *Duhon v. Petroleum Helicopters, Inc.*, 554 So.2d 1270 (La. App. 3rd Cir. 1989), and if so, to determine which view is correct.

JBF

PJT

_____

Judges

Filed May 22 1990

/s/ Nancy U. Pledger

Clerk

Port No. 975

APPENDIX J

Michael Allen DUHON and Mary Kathryn Duhon,
Plaintiff-Appellants.

v.

PETROLEUM HELICOPTERS, INC., etc.,
Defendants-Appellees.

No. 88-875

Court of Appeal of Louisiana
Third Circuit.

Dec. 13, 1989

Rehearing Denied Jan. 23, 1990.

Writ Denied April 6, 1990

Helicopter passenger and his wife filed strict liability action under state law and general maritime law. The 15th Judicial District Court, Parish of Lafayette, Marcus Broussard, J., set aside a jury verdict and found that the helicopter owner and engine manufacturer were liable, but denied the passenger's motion for a new trial. Appeals were taken. The Court of Appeal, Yelverton, J., held that: (1) the strict liability remedy for damage caused by things in custody did not apply in an action under the general maritime law; (2) the engine manufacturer was liable for injuries caused by a defective gas producer blade; (3) the helicopter owner and manufacturer were not liable; (4) the engine manufacturer's conduct did not warrant the imposition of punitive damages; and (5) the total award of $112,000 to the passenger was adequate.

Affirmed in part; reversed in part; and rendered.

Keaty & Keaty, Robert B. Keaty, Lafayette, for plaintiffs-appellants.

McGlinchey, Stafford, Mintz, Cellini & Lang, Ken Laborde and Sharon Gross, New Orleans, for PHI and AVCO.

Roy & Forrest, L. Albert Forrest, New Iberia, for AVCO.

Jones, Walker, Waechter, Poitevent, Carrere & Denegre, Donald O. Collins, New Orleans, for Aerospatiale Helicopter.

McBride, Foret, Rozas & Leonard, Robert R. McBride, Lafayette, for USF & G.

Phelps, Dunbar, Marks, Claverie & Sims, Howard Daigle, Jr., New Orleans, for Garrett Corp.

Taylor, Porter, Brooks & Phillips, W. Luther Wilson, Baton Rouge, for Parker.

Before DOMENGEAUX, YELVERTON and KING, JJ.

YELVERTON, Judge.

Michael Allen Duhon was a passenger aboard a helicopter which was involved in two accidents in 1983 in the Gulf of Mexico. Claiming personal injuries suffered from both accidents, he and his wife, Mary Kathryn Duhon, sued multiple parties, the number of which by the time of trial were reduced to four: Petroleum Helicopters, Inc. (PHI), the owner of the aircraft; AVCO-Lycoming, the

manufacturer of the engine that powered the aircraft; Aerospatiale Helicopter Corporation and its parent company, Societe Nationale Industrielle Aerospatiale (collectively, Aerospatiale), the manufacturer of the aircraft; and John Airington, the pilot on both occasions.

Basing their claims on the strict liability provisions of Louisiana tort law and also on the general maritime law, Duhon asked for compensatory damages and punitive damages, and his wife sought an award for loss of consortium. After a three week trial the judge directed a verdict finding that Duhon was not contributorily negligent. The case was given to the jury in the form of a special verdict consisting of nine interrogatories, and the jury was instructed to answer at least the first eight. The jury responded to Interrogatory No. 1 of the special verdict by finding that Duhon suffered "injuries or an aggravation of a pre-existing condition", caused by one or the other, or both, of the landings at sea. The jury found that no defendant was liable. The jury then determined that Michael Duhon had $112,000 in damages and his wife had $10,000 in damages.

In post-verdict proceedings, the trial judge set aside the jury verdict as to the liability of PHI and AVCO-Lycoming, and found that those defendants were liable. The trial court denied the plaintiffs' motion for a new trial.

The plaintiffs have appealed claiming error in the failure to find Aerospatiale liable and in the failure to award punitive damages, and seeking an increase in the award. They alternatively asked for a new trial based upon the discovery of new evidence, and four allegedly erroneous evidentiary rulings by the trial judge.

The two defendannts who were cast in judgment also appealed. PHI assigns as error the directed verdict against it, arguing that the strict liability provision of La. C.C. art. 2317 is inapplicable in a suit under the general maritime law. AVCO-Lycoming assigns as error the directed verdict against it, arguing that there was no proof its engine was defective in either design or manufacture. The defendant do not complain on appeal of the amount of damages awarded.

THE AUTOROTATIONS AT SEA

Michael Duhon, age 28 at the time of trial, was employed by Southern Petroleum Laboratories of Lafayette, Louisiana, as a meter technician. His work required him to be transported from the shore base in Lafayette to offshore oil platforms in the Gulf of Mexico well beyond a marine league from the Louisiana coast. His employer had contracted with PHI to ferry him by helicopter to these locations.

On March 31, 1983, Duhon was the sole pasenger on one of PHI's helicopters, an A-Star AS350D, powered by an AVCO-Lycoming LTS 101 engine, flown by John Airington, headed to a platform some 35 miles offshore, when the engine quit at an altitude of 1,000 to 1,500 feet. The pilot autorotated the aircraft safely to the water. An autorotation descent of a helicopter was described by the experts as a procedure by which a pilot brings the aircraft more or less straight down, so that the updraft of air turns the main rotor providing lift to the helicopter and slowing its descent, much like a parachute. In accordance with applicable Federal Aviation Administration (F.A.A.) directives this landing was categorized as an "incident", rather than a crash, because the helicopter sustained no damage and there were no apparent injuries to its occupants. The

pilot testified that the aircraft landed with a jolt on touchdown. Flotation devices, called ditchbags, attached to the main landing gear, kept the helicopter afloat until a rescue vessel arrived about two hours later. In the meantime, the plaintiff and the pilot climbed on top of the helicopter and sat there and talked and waited. When the rescue boat arrive plaintiff jumped from the helicopter to the boat ladder, and while he was on the ladder wave action caused the nose of the aircraft to pin him momentarily against the vessel. This did not cause any apparent injuries and the plaintiff boarded the boat and went ashore.

An investigation following the incident of March 31, 1983, revealed that the engine quit running because a blade on the gas producer rotor of the engine failed as a result of vibrator stress.

About four months later, on July 26, Duhon was a passenger on the same aircraft piloted again by John Airington, when it once more autorotated into the Gulf of Mexico. The evidence rather conclusively established, bolstered by the plaintiff's own pretrial admission, that this was a soft landing, and that plaintiff suffered no injuries as a result of this incident. The cause of this incident was again the failure of an LTS 101 engine, although not the same engine involved in the earlier incident. An investigation resulted in a finding that the cause of this incident might have been the clogging of the fuel manifolds, but the engine was so badly corroded due to exposure to salt water when one of the flotation devices failed, that the experts were unable to say exactly what caused this engine failure.

The trial of the case took place four years after these incidents occurred, and massive discovery took place during that time. At trial plaintiff attempted to show that

structural damage to the aircraft following the July 26 landing, proved that it was a hard landing, or a crash, rather than a soft landing. The great weight of the evidence, however, indicates otherwise. After the helicopter landed, one of the flotation devices bust causing the aircraft to turn over in the water, but all of this occurred after plaintiff had left the plane and boarded an inflatable raft. The aircraft was thereafter towed in the water to a nearby platform, and the expert testimony indicated that it was this towing of the partially submerged aircraft in heavy seas that caused the structural damage, and not the landing itself.

Inasmuch as the evidence conclusively establishes that whatever injuries plaintiff suffered were incurred as a result of the March 31 incident, and not the July 26 soft landing, we consider it unnecessary to spend any more time discussing the July 26 landing.

A PARIAH IN THE HELICOPTER INDUSTRY?

The plaintiffs undertook to convince the jury that the A-Star AS350D aircraft with its AVCO-Lycoming LTS 101 engine was what they described as a "pariah in the helicopter industry". They attempted to show that AVCO-Lycoming and PHI administrative personnel, as well as Aerospatiale, knew that all LTS 101 engines were unreliable, and that, nevertheless, the engines were kept in use. It was this alleged conduct on which they based their claim for punitive damages. Believing that if there was proof of the elements for punitive damages, all other proof requirements to show fault would take care of themselves, their strategy was throughout to present a punitive damage case.

There was a defect in the LTS 101 engine that failed

on March 31. Robert K. Phillips, an expert in aircraft accident investigation and failure analysis, testified by deposition for the plaintiffs. He opined—and this fact is conceded by the defendants—that the March 31 power loss was related to a separation of a gas produced blade, caused by metal fatigue, a mechanical failure in the engine. This is what caused the helicopter to have to go down.

Another expert witness, Guido Semprebon, an aeronautical engineer formerly employed by AVCO-Lycoming, examined the blade and explained that it failed due to vibratory stress fatigue. According to him, this is a problem that is anticipated in the design and manufacture of the blade, but, because of the tolerance that the blade is manufactured to in the casting, no two castings and no two blades are exactly alike. One could be stronger or weaker. This witness said, "The material equalizer could be different and a blade now and then gets excited". He said there then can occur an "upstream excitation". He knew of 18 or 20 AVCO-Lycoming engines in which this fatigue failure occurred, but that was before blade dampers were incorporated into rotors to control vibratory stresses. The engine involved in this case did not have blade dampers.

In the helicopter industry problems with new equipment are apparently normal and expected. Thomas W. Beavers, an operations inspector for the F.A.A. so testified. An experienced helicopter pilot himself, Beavers was an inspector from 1970 to 1986. He worked out of the Baton Rouge F.A.A. office, and one of his main responsibilities was to oversee the operations of PHI. He was called as a witness for PHI. He testified that he never had any information or knowledge that the A-Star was an unsafe aircraft. Beavers was extensively cross-examined by the plaintiffs covering, in depth, such general subjects as autorotation procedures, reporting procedures required by

the F.A.A. and the National Transportation Safety Board (N.T.S.B), and how to assess damage to aircraft. The subject of the LTS 101 engine was barely mentioned. Here is the complete cross-examination testimony on that subject:

Q. Anytime before July of 1983 in respect to your job at PHI and other operators, did you ever have occasion to come across information pertaining to the problems experienced by operators with the LTS 101 engine?

A. Yes.

Q. Can you tell us what it was Mr. Beavers?

A. No, sir. I just know that there were some failures and some corrective action taken. We would get correspondence through telling what—that the airworthiness inspectors must do to go out and see that these things were done. As all new engines—this was a new engine build—I'm not sure—for just this aircraft, but it was—this little, small engine was new and it was some problems, as all new equipment comes out with problems. But there was just corrective action, is what I'm talking about. That's what I would read about—the correction action that the F.A.A.'s taken on it.

None of the people close to this aircraft at PHI ever had any problems with the engine except the two incidents involved in this case. Vernon Elias Albert, vice-presidnet and chief pilot for PHI, testified that in 1983 he was aware that there had been some engine failures in the LTS 101. However, except for the failures with which this case is concerned, it does not appear that PHI had itself ever experienced any of these problems. Warren J. Cabaret, Jr.,

Director of Flight Safety, testified that he never heard any complaints about the LTS 101 engine, and that PHI was happy with the engine. Similar testimony was given by Frank W. Lee, PHI's president, who declared that there never were any unusual problems with the LTS 101. He said if he had ever thought that there were real problems, he would have grounded the equipment. The pilot, Airington, testified that he had been flying this aircraft, with the LTS 101 engine, for three years, and had complete confidence in it.

We go next to an explanation of the role that the jury played, and the role that the trial judge played, in fashioning the judgment that is before us on appeal. After that explanation, we will discuss the liability issues, the sufficiency of the award, and whether the evidentiary rulings were prejudicially erroneous.

WHAT THE JURY DID

The jury was instructed that ordinary negligence principles applied to the conduct of PHI. The jury was told that negligence was the failure to use reasonable care. The trial judge charged the jury that products liability law applied to the conduct of AVCO-Lycoming and Aerospatiale and explained what that was. In the damages part of the jury instructions, punitive damages were discussed, and the jury was told it could award punitive damages if it found that a defendant was "guilty of gross negligence or actual malice or criminal indifference, which is the equivalent of reckless and wanton misconduct".

The jury was asked to render its verdict in the form of answers to interrogatories. Here are the interrogatories, and the jury's responses, to the first eight questions:

1. Do you find that Michael Duhon suffered injuries on an aggravation of a pre-existing condition, either physical or mental, which was caused by the occurrence of March 31, 1983, or July 26, 1983, or both?

   YES X

   NO ___

2. Do you find that PHI and/or Evangeline Airmotive was at fault, either wholly or in part, under any of the rules of law which I have explained to you for either or both of the March and July occurrences?

   YES ___

   NO X

3. Do you find that AVCO-Lycoming was at fault, either wholly or in part, under any of the rules of law which I have explained to you for either or both of the March and July occurrences?

   YES __

   NO X

4. Do you find that Aerospatiale Helicopter Corporation and/or its parent company was at fault, either wholly or in part, under any of the rules of law which I have explained to you for either or both of the March and July occurrences?

   YES __

   NO X

5. Do you find that the pilot, John Airington, was at fault, either wholly or in part, under any of the rules of law which I have explained to you for either or both of the March and July occurrences?

YES__

NO X

6. What amount, if any, do you find will fully and fairly compensate Michael Duhon for the injuries and losses which he sustained in one or both of the occurrences? For any item which you do not feel that an award is due, place a "O" in the blank.

(A) Past and future physical pain and suffering: $ 17,250.00

(B) Past and future mental pain and suffering: $ 17,250.00

(C) Disability and loss of enjoyment of life: $ 0

(D) Medical expenses, past and future: $ 57,500.00

(E) Loss of earnings and loss of earning capacity, past and future; $ 20,000,00

7. What amount, if any do you award to Mrs. Duhon for loss of consortium:

$ 10,000.00

8. Do you find that one or more of the defendants acted grossly negligent or showed a willful disregard for the safety of Michael Duhon, which caused his injuries and losses?

YES__

NO X

If your answer to question 8 above is no, go no further.

After receiving this verdict, the result of three hours of deliberation, the trial judge, not being certain that the jury meant to find damages but no liability, told the jury that he was not sure they intended this result, and sent them back to reconsider. Returning after this reconsideration, which took another 45 minutes, the jury told the court that that was, indeed, their verdict.

WHAT THE TRIAL JUDGE DID

At the conclusion of the presentation of the evidence, before the case was submitted to the jury, all parties moved for directed verdicts on the issues of liability. The trial judge denied the motions of the defendants, but took the plaintiffs' motions under advisement, explaining that he had not been able to look at the voluminous exhibits in evidence, and that he needed to do so before considering the motions. Some two months after the jury verdict, the trial judge directed verdicts against AVCO-Lycoming, the manufacturer, and PHI, the custodian of the aircraft. The court cited La.C.C. art. 2317 as authority for both directed verdicts.

As to Aerospatiale, the trial judge found that there

was no evidence the engine that failed was the same engine put there by the manufacturer of the helicopter, and that there was evidence that the engines were frequently moved and replaced when service or repairs were necessary. As to this defendant he denied the motion for a directed verdict.

THE LIABILITY ISSUES

PHI

On this appeal all parties treat the trial judge's directed verdicts, rendered pursuant to La. C.C.P. art. 1810, as judgments notwithstanding the verdict, as provided by La.C.C.P. art. 1811. We will do the same for it makes no difference what we call them: the standard for determining the propriety of granting a judgment notwithstanding the verdict is the same as used to determine whether a directed verdict should be granted. The standard is: after considering all of the evidence in the light and with all reasonable inferences most favorable to the party opposed to the motion, if the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, granting of the motion is proper. *Rougeau v. Commercial Union Insurance Co.*, 432 So.2d 1162 (La.App. 3d Cir. 1983). writ denied, 437 So.2d 1149 (1983).

As to PHI, however, we do not review by the "reasonable men" standard; rather, we will disregard the trial court's judgment N.O.V., as well as the jury's finding of no negligence, and make an independent determination of whether or not the plaintiff proved that PHI was at fault in accordance with applicable law. The reasons why we feel compelled to disregard both the judge's and the jury's findings in this case are explained as follows.

[1,2] The liability of PHI is controlled by the general maritime tort law. A helicopter ferrying passengers from shore to an artificial island is engaged in a function traditionally performed by waterborne vessels, and if it is involved in an accident on the high seas, admiralty jurisdiction is invoked. *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986). The plaintiffs here are in state court because of the "saving to suitors" clause of 28 U.S.C.A. § 1333. Plaintiffs are in state court seeking a remedy for a wrong, but if the remedy sought under state law alters or conflicts with the maritime or admiralty law which establishes the substantive rights of the parties, then the federal substantive admiralty or maritime law controls. *Hebert v. Diamond M. Co.,* 367 So.2d 1210 (La.App. 1st Cir.1978).

[3] The question before us is whether the strict liability remedy of La.C.C. art. 2317 is available to the plaintiffs in this admiralty case.

We decide that it is not. Under La.C.C. art. 2317 and the jurisprudence interpreting it, legal fault is imposed on the custodian of a thing for damage caused by a defect in the thing, ragardless of any personal negligence by the custodian. *King v. Louviere,* 543 So.2d 1327 (La.1989). The strict liability or legal fault that arises from La.C.C. art. 2317 is more than a rebuttable presumption of negligence. *Halphen v. Johns-Manville Sales Corp.* 484 So.2d 110 (La.1986). The custodian cannot be absolved from his strict liability even if he proves that he did not know and could not have known of the unreasonable risk to others. *Id.* at 116.

[4] We have been unable to find anything in the general maritime tort law the same as La.C.C. art. 2317. The warranty of seaworthiness and the liability that at-

taches to the breach thereof may have some kindred features, but it is applicable only to seamen; there is no implied warranty of seaworthiness extended to passengers. *Complaint of Compagnie Generale Transatlantigue,* 392 F.Supp 973 (U.S. D.C., Puerto Rico, 1975). Instead, a carrier's duty when transporting passengers requires him to exercise a very high degree of care. *Moore-McCormack Lines, Inc. v. Russak,* 266 F.2d 573 (9th Cir., 1959). Merely because an accident occurs, however, a carrier does not become liable to a passenger. *Katz v. Cie Generale and Transatlantigue,* 271 F.2d 590 (4th Cir. 1959). A passenger may recover personal injury damages only if he proves the fault or negligence of a carrier. *Counts v. Lafayette Crewboats, Inc.,* 622 F.Supp. 299 (W.D.La.1983).

[5] Since the general maritime tort law requires proof of negligence by a passenger who sues a common carrier, and La.C.C. art. 2317 does not require proof of negligence, there is a substantive conflict affecting the rights of the parties, and the maritime law must prevail.

[6] The evidence concerning the liability of PHI for the March 31 accident was aimed at establishing two theories. First, it was shown that something was wrong with the engine. Second, an effort was made to establish pilot error on the part of Airington in the descent, causing a hard landing. Since the jury made a finding that Airington was not at fault, and this finding is not assigned as error by the plaintiffs on appeal, it is unnecessary to discuss whether PHI might be liable for the negligence of its pilot. This leaves for consideration only whether the failure of the engine was caused by any negligence on the part of PHI, or whether PHI had knowledge of its propensity to fail and flew it in disregard of that knowledge.

The expert Robert K. Phillips reviewed the engine

records of this engine from the time it was installed until the time of the accident, and gave testimony that from those records the engine had always performed normally, and that there was "no trend that would have been apparent [or] anything that would indicate something was going to happen."

The expert Semprebon praised PHI's engine maintenance at its shop. The separation of the blade, according to Semprebon, was not due to over stress by the pilot or lack of maintenance on the part of PHI.

The substance of the testimony of these experts was that nothing PHI did in the way of maintenance or operation caused the blade to fail, and there was nothing that it could have done to prevent it. Nor was there any evidence that PHI was aware that such a problem might occur, since it had no prior experience with such failures.

Plaintiff's argue that the bad record of LTS 101 was so well known throughout the aviation industry that it was gross negligence, to say nothing of ordinary negligence, for PHI to carry passengers in an aircraft powered by that engine. The testimony does not support a finding that the LTS 101 was considered unsafe in the aviation industry. No witness said so. There was no evidence that it had ever been grounded by the F.A.A. or the N.T.S.B. The engine had some early developmental problems but the evidence is that the PHI people were not aware of this until after March 31, 1983.

Our evaluation of the evidence in this record reveals that no proof, not even of the "smallest" or slightest negligence, exists against PHI. Nothing short of grounding its entire fleet of AS350D aircraft would have exempted PHI from liability, if continuing to fly with the LTS

101 engine on the evidence before us convicts it of negligence rendering it liable under the maritime common carrier laws. On the evidence before us we are not persuaded that PHI by continuing to fly the aircraft acted negligently. The jury, although instructed that PHI's duty was that of ordinary care, reached the same result by finding that PHI was not at fault or negligent. Our disposition of this issue is accordingly consistent with the finding of the jury. We reverse the judgment N.O.V. and reinstate the jury verdict as to this defendant.

AVCO-LYCOMING

[7] The trial judge properly rendered a judgment N.O.V. against AVCO-Lycoming as the manufacturer of a defective product.

As to AVCO-Lycoming the trial judge gave the jury a correct instruction of the law of products liability. Strict products liability is part of the general maritime law. *Vickers v. Chiles Drilling Co.*, 822 F.2d 535 (5th Cir.1987). Louisiana products liability law is for all practical purposes the same as federal maritime products liability law. *Forbes v. A & P Boat Rentals, Inc.*, 689 F.Supp. 625 (E.D.La.1988), p. 629, n. 4. A product is unreasonably dangerous in construction or composition if at the time it leaves the control of its manufacturer it contains an unintended abnormality or condition which makes the product more dangerous than it was designed to be. *Halphen v. Johns-Manville Sales Corp.*, supra, at 114. A manufacturer or supplier who sells a product with a construction or composition flaw is subject to liability without proof that there was any negligence on its part in creating or failing to discover the flaw. *Id.* at 114.

In this case there is no question that AVCO-

Lycoming designed and built the gas producer rotor in the engine. One of the gas producer blades broke causing the engine to fail. The blade broke because of fatigue. Since the experts testified that the stress on the blade could not have been caused by operational or maintenance error, all that is left to explain it is that the blade was defective in either design or construction. Similar blade failures had previously occurred before dampers were installed. AVCO-Lycoming is liable for its defective product. Considering all of the evidence in the case in the light and with all reasonable inferences most favorable to AVCO-Lycoming, we agree with the trial court that the facts and inferences point so strongly and overwhelmingly in favor of the plaintiffs that reasonable men could not arrive at a contrary verdict. The trial court's judgment N.O.V. was proper.

AEROSPATIALE

[8] The trial jury was properly instructed pertaining to the liability of Aerospatiale as manufacturer of the aircraft. The jury found Aerospatiale not liable. The trial judge denied a motion for judgment N.O.V.

As noted by the trial judge in his denial of the motion for judgment N.O.V., and as shown by the documentary evidence, as well as by the testimony, the engine which failed on March 31, 1983, was not the engine in the aircraft at the time of its manufacture or its sale to PHI. The evidence established that the autorotation of March 31 was rendered necessary solely because of the malfunction of the engine, and not because of any defect in the aircraft itself. A manufacturer cannot be liable in a products liability claim where it shows that it did not manufacture or install the component of the product alleged to be defective. *Newman v. General Motors Corp.*, 524 So.2d 207 (La.App. 4th Cir.1988).

PUNITIVE DAMAGES

[9] Punitive damages are available under the general maritime tort law. *In re Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir.1981). Punitive damages may be recovered when a wrongdoer has acted willfully and with gross disregard for the plaintiff's rights. *Id.* at 625. Punitive damages are disfavored. *Creamer v. Porter*, 754 F.2d 1311 (5th Cir.1985).

The conduct of AVCO-Lycoming in this case was not such as to justify the imposition of punitive damages.

THE AWARD

[10] At the trial Michael Duhon complained of a herniated cervical disc, damage to the ulnar nerve, a carpal tunnel syndrome, mental pain and suffering, and consequent permanent disability.

The jury awarded him a total of $112,000 in damages. He complains on this appeal that that award was insufficient, particularly the economic loss of only $20,000.

As a meter technician Duhon was earning $13,500 a year in 1983. He testified that during the intervening four years between the accident and the trial he had not been able to work at all. The jury's itemized award to him of only $20,000 in loss of earnings was a clear indication that they did not believe he was disabled to the extent claimed.

There was testimony by plaintiff's treating physicians from which the jury could have concluded that the doctors were not fully informed as to his pre-accident physical condition, and that their attribution of his symptoms to the accident was influenced by an inaccurate

medical history. For example, although he told his doctors that his neck pain, headaches, and insomnia did not begin until after March 31, 1983, the evidence at trial revealed that before that date he had seen a chiropractor, Dr. Robert Earl Lee, over 150 times for the same primary complaints as those asserted in this lawsuit.

Mr. Duhon had also been involved in three accidents before March 31, 1983, and was involved in four more between the helicopter incidents and the trial.

The doctors could not say that his elbow and wrist problems were caused by the unscheduled landings, as ulnar neuropathy and carpal tunnel syndromes may be caused by many things other than trauma. Neck surgery was performed in 1984, but the evidence that Mr. Duhon had been seeing a chiropractor for neck pain for five years before the emergency landings virtually eliminated these incidents as the cause of his neck problem, and cast doubt on whether they aggravated it.

Before an appellate court can disturb a trial court's award of damages, the record must clearly show an abuse of discretion. *Beard v. Republic-Vanguard Insurance Co.*, 509 So.2d 561 (La.App. 3d Cir.1987). Credibility determinations are peculiarly the province of the trier of fact. *Senegal v. George Theriot's, Inc.*, 445 So.2d 137 (La.App. 3d Cir.1984), writ denied, 448 So.2d 114 (1984).

After granting the judgment N.O.V. in this case, the trial judge rendered judgment for the plaintiffs in accordance with the quantum of damages assessed by the jury. The trial judge later denied Mr. Duhon's post-trial motions for a new trial and an additur.

After a thorough review of the record pertaining to

damages, we find no error in these rulings. The award of only $122,000 in total damages was not an abuse of the jury's discretion.

THE EVIDENTIARY RULINGS

1.

[11] The trial court did not err in excluding from evidence the cross-claims, answer to cross-claims, and other federal court pleadings filed by PHI.

In a federal lawsuit the hull insurer filed pleadings on behalf of PHI against AVCO-Lycoming and Aerospatiale, alleging that the engine in the aircraft on July 26, 1983 (when hull damage from wave action occurred), was defective. The plaintiffs wanted to show this pleading to the jury as a judicial admission showing PHI's knowledge that the engine was defective, for punitive damage purposes.

Besides being totally irrelevant to the present case, the allegations were not judicial confessions. A judicial confession, as meant by La.C.C. art. 1853, is an express acknowledgment of an adverse fact. *Howard Trucking Co. v. Stassi,* 485 So.2d 915 (La.1986), cert. denied, 479 U.S. 948, 107 S.Ct. 432, 93 L.Ed.2d 382 (1986). The federal pleadings were not at all an acknowledgment that PHI knew before March 31, 1983, that the LTS 101 engine was defective.

2.

[12] The trial court did not err in excluding from evidence a letter to Frank Lee, PHI's president, from Duhon's employer, Southern Petroleum Laboratories, complaining about the A-Star 350D.

The letter was written on August 1, 1983, after the two autorotation landings in this case. The plaintiffs contend that the letter should have been admitted to impeach Gene Graves, a PHI employee, who testified on cross-examination that Southern Petroleum Laboratories had never expressed any dissatisfaction with the helicopter.

Actually, Gene Graves testified only that he could not himself recall receiving any complaints from Duhon's employer before March of 1983. The letter could not have impeached that testimony and it was properly excluded.

3.

[13] The trial judge recognized plaintiffs' witness, Robert G. Ferry, as an expert helicopter pilot, but refused to qualify him as an expert in helicopter operations and aircraft accident reconstruction. The plaintiffs complain that this was error.

La.C.E. art. 702 provides that a witness qualified as an expert by knowledge, skill, experience, training, or otherwise, may give testimony as an expert. The comments to the article note that broad discretion should be accorded the trial judge in his determination of who should or should not be permitted to testify as an expert.

The witness was extensively examined by both sides as to his qualifications. The trial judge found that he had no experience as an air taxi operator under F.A.A. regulations, and therefore could not qualify as an expert in helicopter operations. He had never attended an aircraft accident investigation school, was not an aircraft mechanic, did not have an engineering degree, had flown the A-Star for only one hour in his career, and he had no manufacturing or design experience in aircraft.

The trial judge did not abuse his discretion in refusing to qualify the witness in these respects. Further, we doubt that the witness' testimony in those areas could have assisted the jury in understanding the evidence or determining any fact in issue.

4.

Plaintiffs wanted to introduce into evidence certain articles concerning the A-Star helicopter and the LTS 101 engine that appeared in the commercial magazines "Rotor & Wing International" and "Aviation Weekly." The articles were critical of the aircraft and the engine.

The stated purpose for the introduction of the articles was for the impeachment of witnesses on cross-examination. The admissibility of the articles was predicated on their being self-authenticating documents under the Louisiana Code of Evidence.

Every witness questioned as to his knowledge of the articles declared his familiarity with the magazines but his inability to recollect whether he had ever read the articles. Thus there was nothing to impeach. Moreover, most were written after the incidents in question.

[14] As to their self-authentication, La.C.E. art. 902(6) provides that extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to printed materials purporting to be newspapers or periodicals. This does not exempt the offerings from passing the usual tests for admissibility. The trial court properly refused to admit the articles in evidence. The only basis for allowing them in evidence would have been to establish the truth of the matters asserted therein. Their authors were not produced for cross-examination at trial,

and thus the articles were no more than inadmissible hearsay. *Jennings v. Allstate Insurance Co.*, 273 So.2d 534 (La.App. 1st Cir.1973).

THE DENIAL OF A NEW TRIAL

[15] Finally, the plaintiffs complain that a new trial should have been granted, and that we should now order one, because of the discovery since the trial of evidence important to the cause, which the parties could not, with due diligence, have obtained before or during the trial. La.C.C.P. art. 1972(2).

They refer to 45 service bulletins and airworthiness directories which allegedly were not produced during discovery despite requests for production. In their brief, plaintiffs state that they obtained these documents after trial by means of a telephone call from the F.A.A.

At the hearing on the motion for a new trial, the defendants responded that they had in fact produced all of these documents. Evidently the trial judge agreed with defendants, because the motion was denied.

Because the alleged incomplete response to discovery took place over two years before trial, it would be next to impossible at this late date to reconstruct events and determine whether the questioned documents were, or were not, made available. The trial judge was in a far better position to evaluate the grounds for this motion than are we, and we find no error in his ruling.

For the foregoing reasons, the judgment of the trial court finding PHI liable to the plaintiffs herein and assessing that defendant with a portion of the costs is reversed. In all other respects the judgment is affirmed. Plaintiffs

will pay the costs of this appeal.

REVERSED IN PART; AFFIRMED IN PART; AND RENDERED.

APPENDIX K

COURT OF APPEAL

THIRD CIRCUIT

STATE OF LOUISIANA

CA/88-1365

MICHAEL J. GREEN
Plaintiff-Appellant

UNITED STATES FIDELITY
& GUARANTY COMPANY
Intervenor-Appellant

VERSUS

INDUSTRIAL HELICOPTERS, INC.
Defendant-Appellee

DOUG WRIGHT
Defendant-Appellee

ON APPEAL FROM THE 15TH JUDICIAL DISTRICT
COURT, LAFAYETTE PARISH, LOUISIANA
HONORABLE DON AARON, JR.

APPLICATION FOR REHEARING
ON BEHALF OF APPELLEE
INDUSTRIAL HELICOPTERS, INC.

Mr. Charles R. Sonnier
Mr. Fred W. Davis
SONNIER, HEBERT, CABES
& HEBERT
Magdalen Centre
Two South Magdalen Square
P.O. Drawer 700
Abbeville, La 70511-0700

ATTORNEYS FOR APPELLEE,
INDUSTRIAL HELICOPTERS, INC.

A-142

COURT OF APPEAL

THIRD CIRCUIT

STATE OF LOUISIANA

CA/88-1365

MICHAEL J. GREEN

Plaintiff-Appellant

UNITED STATES FIDELITY
& GUARANTY COMPANY

Intervenor-Appellant

VERSUS

INDUSTRIAL HELICOPTERS, INC.

Defendant-Appellee

DOUG WRIGHT

Defendant-Appellant

ON APPEAL FROM THE 15TH JUDICIAL DISTRICT
COURT, LAFAYETTE PARISH, LOUISIANA
HONORABLE DON AARON, JR.

APPLICATION FOR REHEARING
ON BEHALF OF APPELLEE
INDUSTRIAL HELICOPTERS, INC.

NOW INTO COURT, through undersigned counsel, comes Appellee, **INDUSTRIAL HELICOPTERS, INC. ("INDUSTRIAL" or "APPLICANT")**, who respectfully represents to this Honorable Court, as follows:

APPLICATION FOR REHEARING

1.

As will be noted by reference to the record of the proceedings in this Court, the Honorable Court of Appeals, Third Circut, issued its judgment in this matter on April 18, 1990, amending the decision of the Trial Court to increase Plaintiff's lost wages, as well as affirming the portion of the Trial Court decision finding **APPLICANT** liable under Civil Code Article 2317, and further, remanding for hearing to determine the validity of the deposit of funds in the court registry in an effort by **APPLICANT** to prevent the accrual of continued interest on the judgment amount.

2.

APPLICANT respectfully moves this Honorable Court to grant a rehearing of this appeal in accordance with the provisions of Rule 2-18.1 of the Uniform Rules - Courts of Appeal.

SPECIFICATION OF APPLICANT'S CONTENTIONS

3.

APPLICANT respectfully shows that this Honorable Court erred in amending and affirming the decision of the Trial Court.

1) **DEFENDANT, INDUSTRIAL HELICOPTERS IS NOT LIABALE TO PLAINTIFF UNDER A THEORY OF STRICT LIABILITY UNDER LOUISIANA CIVIL CODE ARTICLE 2317;**

This Court has affirmed the Trial Judge in finding **INDUSTRIAL** strictly liable for damages sustained by the Plaintiff under Louisiana Civil Code Article 2317. The facts of the instant decision are analogous to the facts of *Duhon vs. Petroleum Helicopters, Inc.*, 554 So.2d 1270 (La. App. 3rd Cir. 1989), *rehearing denied, writs denied* in which another panel of this court found Article 2317 **inapplicable** to a helicopter owner under similar facts.

The factual analogies between *Duhon* and Green are overwhelming. We contend the legal result should be the same.

In *Duhon*, a helicopter owned by PHI was transporting Duhon, employed by Southern Petroleum Labs as a meter technician, from shore to an offshore platform in the Gulf "well beyond the Louisiana coast." Green, also a meter technician, was being transported to a rig ninety (90) miles offshore (Tr. p. 696). The helicopter in *Duhon* also lost power and descended to the ocean in what the FAA called an "incident," similar to Green's accident. In *Duhon*, the engine failed because the blade on the gas-producer rotor of the engine failed as a result of vibrator stress.

The Trial Judge in Green found that the sole and proximate cause of the engine failure was the mechanical failure of the aircraft's governor device which controlled the engine RPM's (Tr. p. 618; Appeals Court decision, p. 4). This was a sealed unit which could not be maintained

independently by **INDUSTRIAL**, and a mechanic could not visibly inspect the interior of the governor (Tr. p. 978).

The *Duhon* court found that the helicopter's role in transporting passengers in this manner was within the admiralty jurisdiction of the court, and maritime law required proof of negligence in order to recover from a common carrier and this principle prevailed over the state's strict liability remedy for damages caused by things in custody under Article 2317. The Trial Judge in Green found defendant liable for the mechanical failure as a defect under 2317 (Tr. p. 619) as did the Appeals Court in its decision at pages 3-4, despite the finding of the Trial Judge's Reasons for Judgment that "Industrial Helicopters was not negligent in the inspection of its helicopter and that it was not possible for the defendant to discover the defective governor since no problem of this nature had been reported" (Tr. p. 619), and the pilot error was not a factor in the crash (Tr. p. 618).

Also similar to the instant case, in *Duhon* no evidence showed that the helicopter owner or the operator were negligent in maintenance or operation of the helicopter.

The *Duhon* court held that the state strict liability remedy for damages caused by things in custody was not available to the injured helicopter passenger in such cases. The Trial Judge in Green, however, and affirmed by this Honorable Court found that, although the Plaintiff failed to prove any negligence of Industrial Helicopters in the care and operation of the helicopter, the defendant was nonetheless liable for any damages caused by a defective

thing in its care, custody or control under Civil Code Article 2317 (Tr. p. 619).

If 2317 has previously been held not to apply to facts which are similar to the situation before this panel, it does not make Article 2317 applicable to Green any more than Mr. Duhon. The legal principles and analogous facts as enunciated in *Duhon* should apply to Mr. Green's claims regardless of Duhon's suit being brought under state law and the "saving to suitor's clause" of the Admiralty Jurisdiction Statute. We suggest, therefore, that in light of the precedent established in the circuit via *Duhon* that reconsideration be given to the Appeals Court's affirmation of the Trial Judge's decision applying 2317. **APPLICANT** contends this is adequate grounds for rehearing and reversal of the Trial Court's decision **as a matter of law.**

2) **THE TRIAL COURT DID NOT COMMIT MANIFEST ERROR IN ITS AWARD OF PAST LOST WAGES.**

This Honorable Court failed to give credence to the Trial Judge's assessment of economic loss which, although not specific, must have considered that Green chose to go to trade school and not mitigate his damages, when he was capable of returning to work. The evidence showed that Dr. Heard said he could return to work in May of 1987 (Tr. 1074).

We ask the Appeals Court to reconsider a review of the Trial Judge's assessment of the record in light of the medical evidence indicating that Green could have been employed but simply chose to forego same. He should not now benefit from a windfall award of lost wages and a generous compensation carrier under those circumstances. The Trial Judge found the Plaintiff was capable of work-

ing after the accident and currently had a secure job (Tr. p. 623). The Trial Judge partially discounted Plaintiff's wage claim using what Green could have made even at a lower rate during his injury period before trial.

The Appeals Court decision served to reward the worker's compensation carrier for being a benevolent donor of benefits when its own doctor indicated as early as May, 1987, that Mr. Green was capable of going back to work at his previous occupation (Dr. Heard's testimony, Tr. p. 1074). The carrier's continuation of payments should not necessarily be determinative in assessing the economic damages of Mr. Green. To the contrary, with all due respect to the Court, **APPLICANT** contends that the increase in the award of past lost wages was more a mechanism to circumvent this Honorable Court from having to decide whether or not *Rooks vs. Chicola*, 514 So.2d 7 (La. 1987) applies to this case.

APPLICANT contends the lower court did not abuse its discretion but merely took into consideration numerous factors in making the economic damage award including the medical evidence, the fact that Green went to trade school and was still working at a time in a depressed economy. This Honorable Court has determined the evidence is not sufficient to award future damages. We think that in light of the limited disability as evidenced in the record the entitlement to past wages should be affirmed as per the Trial Court's decision. Factual conclusions of the trial court must be given great weight by a reviewing Court. *Roussel vs. Colonial Sugars Co.*, 318 So.2d 37 (La. 1975). *Vascoca vs. Singletary*, 434 So.2d 597 (La. App. 3rd Cir. 1983).

3) **A REMAND TO DETERMINE THE VALIDITY OF THE DEPOSIT OF FUNDS IN THE REGISTRY OF THE COURT IS UNNECESSARY.**

Although this Court has remanded the issue concerning the deposit of funds in the registry of the Court, we ask the Court to reconsider its ruling in light of the Appellant's withdrawal of funds from the Court's registry soon after its deposit, without notification to Defendant. All the concerns of *LaGraize vs. Bickham,* 391 So.2d 1185 (La. App. 4th Cir. 1980) and *Gagnet vs. Zummo,* 487 So.2d 721 (La. App. 5th Cir. 1986), cited in the Appeals Court decision were met in this instance due to the Plaintiff's withdrawal of the funds and a hearing on that issue would not be necessary.

WHEREFORE, this Honorable Court should grant re-hearing of this matter, and upon oral argument of same, issue a decree that reverses the Trial Court decision entirely or, alternatively, reinstates the judgment of the Trial Court with regard to economic damages and past lost wages and recalls the remand for rehearing on the validity of the deposit of funds in the Court's registry.

Respectfully submitted,

SONNIER, HEBERT, CABES
& HEBERT

BY: /s/ Charles R. Sonnier

CHARLES R. SONNIER #12260
FRED W. DAVIS #1817
Two South Magdalen Square
P. O. Drawer 700
Abbeville, LA 70511-0700
(318) 893-5973
ATTORNEYS FOR APPELLEE
INDUSTRIAL
HELICOPTERS, INC.

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing Application for Rehearing on behalf of Appellee, Industrial Helicopters, Inc., has been served upon all known counsel in this matter by placing a copy of same in the United States mail, postage prepaid and properly addressed, prior to the submittal of the original to this Honorable Court.

Abbeville, Louisiana, this 2nd day of May, 1990.

/s/ Charles R. Sonnier
CHARLES R. SONNIER

APPENDIX L

NUMBER 88-1365

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

APR 18, 1990

MICHAEL J. GREEN
Plaintiff-Appellant

UNITED STATES FIDELITY
& GUARANTY COMPANY
Intervenor-Appellant

Versus

INDUSTRIAL HELICOPTERS, INC.
& DOUG WRIGHT
Defendants-Appellees

On Appeal from the Fifteenth Judicial District Court, Parish of Lafayette, State of Louisiana; Honorable Don Aaron, Jr. Judge, Presiding

Before: FORET, STOKER, and LABORDE, Judges.

LABORDE, Judge.

Plaintiff, Michael J. Green, brought this action for injuries he sustained when a helicopter he was riding in crashed landed in the Gulf of Mexico. Made defendants herein are Industrial Helicopters, Inc. (Industrial

Helicopters), the owner of the helicopter, and Doug Wright, the pilot. United States Fidelity & Guaranty Company (USF&G), the worker's compensation carrier of the plaintiff's employer, intervened in the suit, seeking reimbursement for all compensation benefits and medical payments it has paid to the plaintiff. After a trial on the merits, the trial judge found in favor of the plaintiff and against the defendant. The judgment also recognized USF&G's intervention; however, the intervenor's recovery was limited to the plaintiff's award for economic loss and medical expenses. Plaintiff and intervenor now appeal. Defendants filed an answer to appeal, requesting that this court reverse the judgment in all respects. We amend the decision of the trial judge to increase the economic damage award to the plaintiff and also to increase the amount the intervenor is entitled to recover on its intervention. Additionally, the judgment is amended to allow for legal interest on the intervenor's recovery. The trial judge's decision is affirmed as amended. Finally, we remand this case to the trial court for a contradictory hearing on the defendant's Motion for Deposit of Money Into the Registry of Court and Cancellation of Judgment.

FACTS

Plaintiff was employed by Southern Petroleum Laboratories as a fluid meter technician. This position involved the installing, maintaining and repairing of fluid metering devices on offshore production platforms. Southern Petroleum Laboratories had contracted with Industrial Helicopters to transport its workers out to the platforms.

On November 26, 1984, a helicopter owned by Industrial Helicopters and operated by Doug Wright picked up the plaintiff in Milton, Louisiana and proceeded out

towards the plaintiff's work site in the High Island section of the Gulf of Mexico, off the Texas coast. En route to the area, the helicopter stopped for refueling at Exxon's West Cameron 616 platform. The refueling process was completed and the helicopter took off from the platform. Shortly after lifting off, the helicopter experienced mechanical trouble and was forced to make an emergency landing in the Gulf.

Not long after the helicopter landed in the Gulf, a rescue capsule was launched from the Exxon platform. Upon reaching the helicopter, Exxon personnel assisted the pilot and the plaintiff into the rescue craft. Both men were transported to the Exxon platform, and then, eventually, to land.

The plaintiff claims that he suffered injuries to his ribs, chest, neck, shoulder and jaw as a consequence of the collision. For the three and one-half years between the date of the accident and the date of the trial of this matter, the plaintiff was under medical care from a variety of doctors and dentists. The evidence also indicates that one month after the accident, the plaintiff returned to light duty work with Southern Petroleum Laboratories. He was employed by Southern Petroleum Laboratories for approximately five months at the light duty position, when in May of 1985, he was laid off. The apparent reason for this lay off was that his employer ran out of light duty work for him to perform. After the plaintiff was terminated by his employer, he applied for and received disability benefits pursuant to the Longshore and Harbor Workers' Compensation Act. The plaintiff later enrolled in an electronics course at the Lafayette Regional Trade School. Upon completion of his training in August of 1987, he obtained full-time employment with MASCO, Inc. as an electronic solid state component technician.

Plaintiff, intervenor and defendant, Industrial Helicopters, have appealed the decision of the trial court, each raising several specifications of error.

LIABILITY OF PILOT DOUG WRIGHT

In his Reasons for Judgment, the trial judge stated, "[i]n the Court's opinion, Mr. Wright's handling of this emergency situation was extraordinary. Accordingly, the Court finds that pilot error was not a factor in this crash." We agree, and find no liability on the part of Mr. Wright.

STRICT LIABILITY OF INDUSTRIAL HELICOPTERS

The trial judge found the defendant, Industrial Helicopters, to be strictly liable for the damage sustained by the plaintiff under Louisiana Civil Code Article 2317. Industrial Helicopters argues that this decision is manifestly erroneous.

Louisiana Civil Code Article 2317 provides:

> "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody...."

In Shipp v. City of Alexandria, 395 So. 2d 727, 728-729 (La. 1981), the Louisiana Supreme Court stated the following regarding the applicability of art. 2317:

> "We have described the legal foundation for imposing liability under art. 2317 in the following terms:

> When harm results from the conduct or defect of a person or thing which creates an unreasonable risk of harm to others, a person legally responsible under these code articles for the supervision, care, or guardianship of the person or thing may be held liable for the damage thus caused, despite the fact that no personal negligent act or inattention on the former's part is proved. The liability arises from his legal relationship to the person or thing whose conduct or defect creates an unreasonable risk of injuries to others.

> Jones v. City of Baton Rouge, 388 So. 2d 737, 739 (La. 1978), citing Loescher v. Parr, [324 So. 2d 441, 446 (La. 1975)]. An injured party seeking damages under art. 2317 need not prove negligence, that is, that any particular act or omission on the part of the defendant caused his injuries. He must only prove that the thing which caused the damage was in the care or custody of the defendant, that the thing had a vice or defect, that is, that it occasioned an unreasonable risk of injury to another, and that his injury was caused by the defect. Once these elements are proven the custodian can escape liability only by showing that the harm was caused by the fault of the victim, by the fault of a third person, or by an irresistible force. Jones v. City of Baton Rouge, supra; Loescher v. Parr, supra."

Industrial Helicopters contends that the plaintiff failed to prove the requisite elements of an art. 2317 action. We disagree.

It is undisputed that Industrial Helicopters owned the helicopter in which the plaintiff was a passenger on the crash. Thus, it is clear that the helicopter was in the care and custody of Industrial Helicopters.

We also find that the plaintiff proved that there was a defect in the helicopter, which created an unreasonable risk of harm to the occupants. Both the pilot and a mechanic employed by the defendant, Craig Issac, testified at trial that the crash was caused by a malfunction of the helicopter's governor. This testimony was uncontroverted at trial. The evidence indicates to this court that the failure of the aircraft's governor caused it to lose altitude and eventually crash in the Gulf.

Finally, we determine that the plaintiff proved by a preponderance of the evidence that his injuries were caused by the defect in the helicopter. The plaintiff stated at trial that the jolt of the helicopter's impact with the water caused a strain on his neck and shoulder. He also stated that during the rescue operation he banged his jaw on the outer surface of the rescue vessel. Dr. Thomas C. Laborde, a specialist in physical medicine and rehabilitation, who treated the plaintiff for his neck and shoulder pain, stated at trial that the injuries to these areas could have been caused by the crash. Additionally, Dr. Randolph B. Malloy, an oral and maxillofacial surgeon who has treated the plaintiff for tempromandibular joint (TMJ) dysfunction, testified that the plaintiff's TMJ problems were most likely caused by the accident. The defendant argues that the plaintiff's TMJ dysfunction is the result of preaccident causes; however, after a thorough review of the evidence, we find that the TMJ problems were a direct result of the accident.

Accordingly, we determine that the plaintiff has proved by a preponderance of the evidence that the defendant is strictly liable for the damage sustained by the plaintiff under LSA-C.C. art. 2317.

As a defense to the imposition of liability under art.

2317, the defendant alleges that the Exxon personnel involved in the rescue operation were negligent in carrying out the rescue operation, that their negligence caused the plaintiff's injuries and that such negligence was an intervening cause, which relieved defendant of liability for the plaintiff's injuries. Third party fault is a judicially recognized defense to strict liability action. *Shipp,* supra; Jones v. City of Baton Rouge, 388 So. 2d 737 (La. 1978). Although the plaintiff testified that he injured his jaw during his climb into the rescue craft, there is not sufficient evidence to indicate that the harm which befell the plaintiff resulted from negligence on the part of the rescuers. This defense has no merit.

QUANTUM

Both the plaintiff and defendant appeal the trial judge's damage award. Before we discuss their respective claims, it is necessary to point out that an appellate court can disturb a quantum award only if the record clearly reveals that the trier of fact abused its much discretion in making the award. Bitoun v. Landry, 302 So. 2d 278 (La. 1974); Alexander v. Leger, 423 So. 2d 731 (La. App. 3d Cir. 1982), *writ denied,* 430 So. 2d 75 (La. 1983).

The defendant contends that the trial judge abused his discretion in awarding the plaintiff $40,000.00 in general damages and $15,000.00 in future medical expenses. We have carefully reviewed the evidence pertaining to these awards, and find them not to be an abuse of the trial judge's discretion.

The plaintiff, on the other hand, would have this court increase the trial judge's economic damage award. The trial judge awarded the plaintiff $25,000.00 in economic damages, which figure represents both his past

and future lost wages. The plaintiff claims that his lost wages through the date of trial were $66,400.00 and that his loss of future wages would amount to between $150,000.00 and $190,000.00. We agree that there should be an increase in the plaintiff's past lost wage award, but we do not think he is entitled to any damages for loss of earning capacity.

The trial judge was not specific as to what portion of the $25,000.00 economic damage award constituted past lost wages, nor did the trial judge explain what evidence he took into consideration in reaching the amount of the plaintiff's lost wages. The evidence presented in the record establishes that the plaintiff is entitled to a greater amount than $25,000.00 (which the trial court awarded for both past and future lost wages) for past lost wages alone. Therefore, this court finds that the trial judge abused his discretion in making the past lost wage award.

Once a reviewing court makes the finding that the record clearly establishes that the lower court abused its discretion in making an award, it may then modify the award. However, the appellate function in reviewing quantum is limited to raising inadequate awards to the lowest amount the lower court could have reasonably awarded, or lowering excessive awards to the highest amount the lower court could have reasonably awarded. It is never appropriate for a reviewing court having found that the trial court abused its discretion, simply to decide what it considers an appropriate award on the basis of the evidence. Reck v. Stevens, 373 So. 2d 498 (La. 1979); Coco v. Winston Industries, Inc., 341 So. 2d 332 (La. 1976); Tate v. Trinity Universal Insurance Company, 465 So. 2d 235 (La. App. 3d Cir. 1985).

The plaintiff claims that he is entitled to $66,400.00 in past lost wages. Lost wages need not be proven with

precision, reasonable certainty is the standard. Finley v. Bass, 478 So. 2d 608 (La. App. 2d Cir. 1985). We find that this figure is a true representation of the plaintiff's lost wages, and is, therefore, the lowest amount that the trial judge could have awarded the plaintiff for his past wage claim.

The plaintiff would also have this court increase the trial judge's award for loss of earning capacity. Conversely, the defendant would have us reduce it or eliminate it altogether. As was previously mentioned, the trial judge awarded the lump sum of $25,000.00 for both past and future lost wages. The plaintiff argues that this award consitutes an abuse of the trial court's discretion and seeks to have it increased to between $150,000.00 and $190,000.00. We believe the amount claimed by the plaintiff for future lost wages is not substantiated by the record. Furthermore, we find that the trial court abused its discretion in awarding any amount for future lost wages because the plaintiff has not proved by a preponderance of the evidence that he is entitled to such an award.

A plaintiff who seeks to recover for loss of earning capacity must prove the extent of his injuries resulting from the accident. He also has the burden of proving that the injuries he sustained have incapacitated him from, in the future, doing work of a reasonable character, that is, work for which he was fitted by training and experience, of the same or similar kind in which he was engaged at the time of the accident. Viator v. Gilbert, 253 La. 81, 216 So. 2d 821 (1968); Chaney v. Our Lady of Fatima Catholic Church, 391 So. 2d 501 (La. App. 3d Cir. 1980).

The medical evidence presented by the plaintiff does not clearly establish that the plaintiff cannot perform work of similar character to his former occupation. The plaintiff

offered the testimony of several of his treating physicians, and although all of them stated that he has some degree of pain or discomfort, not one of them testified as to whether the plaintiff had any residual disability or whether he would necessarily be restricted in his occupational activities in the future. Dr. Laborde, the physician who treated the plaintiff primarily for his neck and shoulder pain, testified that he did not initially restrict the plaintiff's activities, but that later in his treatment of the plaintiff, he recommended that the plaintiff avoid repetitive bending, stooping or lifting, being in one position for longer than one hour, lifting weight of over twenty-five pounds and exposure to vibrational stresses. Dr. Laborde did not state how long these recommended restrictions were to last, nor did he state whether he believed that the plaintiff had any permanent impairment which would preclude him from performing certain types of jobs.

In view of the lack of evidence as to this item, any award for loss of future income in the instant case would be totally speculative and unsupported by the record. Therefore, we find that the trial court abused its discretion in awarding any future lost wages to the plaintiff.

INTERVENOR'S RECOVERY

The intervenor, USF&G, argues that the trial judge erred in limiting its recovery to the plaintiff's awards for economic damages and medical expenses. Presumably, the trial judge limited the intervenor's recovery under the authority of the Louisiana Supreme Court's decision in Brooks v. Chicola, 514 So. 2d 7 (La.1987). The court in *Brooks* held that an employer or its worker's compensation carrier is not entitled to recover reimbursement or future credit from the employee's award of general damages in a suit against a third party tortfeasor. The intervenor

argues that it has paid compensation benefits pursuant to the Federal Longshore and Harbor Workers' Compensation Act, and not under the Louisiana Workers' Compensation Act, and that the *Brooks* case is not applicable to the Federal Act. We find it unnecessary to address this issue, as the intervenor should be able to recover its full claim from the plaintiff's augmented past lost wage award and the award for medical expenses. Indeed, since this court increased the plaintiff's past lost wage award, there should be no need for the intervenor to look to the plaintiff's general damage award for its reimbursement. Accordingly, we hold that the intervenor is entitled to recover the full $66,485.38 from the plaintiff's past lost wage award and the award for medical expenses.

INTEREST ON THE INTERVENOR'S RECOVERY

Intervenor points out that the judgment awarding it reimbursement for benefits paid to the plaintiff failed to include a provision for legal interest. Intervenor is entitled to legal interest on the amount paid to the plaintiff. That amount includes interest on all amounts paid as of the date of intervernor's demand, together with interest on any amounts paid after judicial demand, until such time as the judgment becomes final. Breaux v. Roy Young, Inc., 397 So. 2d 1384 (La. App. 3d Cir. 1981); Willis v. Stauffer Chemical Co., 349 So. 2d 1390 (La. App. 3d Cir.), *writ denied*, 352 So. 2d 1047 (La. 1977).

INTEREST ON THE PLAINTIFF'S RECOVERY

The final issue on appeal is raised by the plaintiff and concerns the suspension of judicial interest. A couple of months after the conclusion of the trial on this matter, the defendant sought to terminate the accumulation of legal interest on the amount of the judgment against it through the filing of a Motion and Order for Deposit of Money Into

the Registry of Court and Cancellation of Judgment. The order requested the Clerk of Court of Lafayette Parish to deposit the sum of $130,048.83 into the Registry of the Court. This sum allegedly represented the amount of the judgment and accrued interest up through the time it was tendered to the plaintiff and intervenor. The trial judge, without contraditory hearing, signed the order on September 26, 1988.

Although there is limited jurisprudence on this issue, two other circuits have allowed such depository procedures. See Gagnet v. Zummo, 487 So. 2d 721 (La. App. 5th Cir. 1986); LaGraize v. Bickham, 391 So. 2d 1185 (La. App. 4th Cir. 1980). Both cases held that a defendant, who is cast in judgment, may deposit the full amount of the judgment into the Registry of the Court, together with the accrued costs and interests and be relieved of added costs and interest in the event that the plaintiff appeals. In the *LaGraize* case, our brethren in the Fourth Circuit stated that for a party to utilize this procedure, the following conditions have to be met:

> "There first must be a tender to and refusal to accept by the judgment creditor. The tender and/or the deposit must be for the full amount of the judgment, including costs and interest. It must be unconditional and constitute a complete waiver of any future defense as to liability on the part of the judgment debtor. Acceptance of the tender and/or withdrawal of the funds by the judgment creditor(s) is without prejudice to any of its (their) rights to appeal as to quantum. In the event of an increase in quantum on appeal, the judgment debtor is liable for all additional costs together with legal interest on the amount of the increase from date of judicial demand until paid."

LaGraize at 1190-1191. Since the defendant's motion would have had to be supported by proof that the *LaGraize* conditions were met, the trial judge erred in granting the motion ex parte. LSA-C.C.P. art. 963; State v. Williams, 536 So. 2d 1312 (La. App. 2d Cir. 1989); Conner v. Conner, 481 So. 2d 639 (La. App. 1st Cir. 1985). Therefore, we remand to the trial court to hold a contradictory hearing on the defendant's motion with instructions to the trial judge to grant the motion only if he finds the *LaGraize* conditions to be met by the defendant.

For the above and foregoing reasons, the judgment of the trial court is amended and affirmed, increasing the plaintiff's past lost wage award to $66,400.00 and eliminating any award made for future lost wages.

The plaintiff's total award is as follows:

General Damages	$ 40,000.00
Past Lost Wages	$ 66,400.00
Past Medical Expenses	$ 18,747.75
Future Medical Expenses	$ 15,000.00
TOTAL AWARD	$140,147.75

We also amend the trial court's judgment to allow the intervenor full recovery of its intervention or $66,485.38. Furthermore, plaintiff and intervenor are entitled to legal interest on their respective awards from date of judicial demand until paid. This case is remanded for reasons stated hereinabove. Costs are to be borne 2/3 by the defendant and 1/3 by the plaintiff.

AFFIRMED AS AMENDED.

REMANDED FOR CONTRADICTORY HEARING ON THE DEFENDANT'S MOTION.

APPENDIX M

FIFTEENTH JUDICIAL DISTRICT COURT
PARISH OF LAFAYETTE
STATE OF LOUISIANA

Filed
JUL 11 1988

MICHAEL J. GREEN

VERSUS

DOCKET NO:
85-7722-J

INDUSTRIAL HELICOPTERS,
INC., ET AL

::::::

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment be entered herein in favor of Intervenor, UNITED STATES FIDELITY & GUARANTY, against INDUSTRIAL HELICOPTERS, INC. in the amount of FORTY THREE THOUSAND SEVEN HUNDRED FORTY-SEVEN AND 75/100 ($43,747.75) Dollars, Workmen's Compensation Benefits paid to or on behalf of MICHAEL J. GREEN, said sums to be paid by preference and priority out of the principal sum awarded hereinabove to MICHAEL GREEN;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment entered herein in favor of defendant, DOUG WRIGHT and against plaintiff and intervenor, dismissing their claims against him with prejudice; and

Expert witness fees as itemized below are hereby taxed as additional Court costs including:

A.	Dr. William Barrios	$ 150.00
B.	Dr. Randolph Malloy	$ 350.00
C.	Dr. Thomas LaBorde	$ 175.00
D.	Dr. Michael Heard	$ 150.00

and all costs, including expert witness fees, are cast two-thirds (2/3rds) to defendant, INDUSTRIAL HELICOPTERS, INC. and one-third (1/3rd) to plaintiff, MICHAEL GREEN.

JUDGMENT READ, RENDERED AND SIGNED in Crowley, Acadia Parish, Louisiana, the 7th day of July, 1988.

/s/ Don Aaron, Jr.
DISTRICT JUDGE

APPROVED AS TO FORM:

SHELTON AND LEGENDRE
Attorneys at Law
Post Office Drawer 52548
2448 Johnston Street
Lafayette, LA 70505
318/233-7084

Bt: /s/ Karl W. Bengtson
KARL W. BENGTSON
Attorney for Plaintiff

GACHASSIN, HUNTER AND SIGUR
Attorneys at Law
Post Office Box 2850
102 St. John Street
Lafayette, LA 70501
318/235-4576

By: /s/ Nicholas Gachassin, Jr.
NICHOLAS GACHASSIN, JR.
Attorney for Intervenor

SONNIER, HEBERT & HEBERT
Attorneys at Law
Post Office Box 1040
Two South Magdelen Square
Abbeville, LA 70511
318/893-5973

By: /s/ Charles R. Sonnier
CHARLES R. SONNIER
Attorney for Defendants

Filed July 8, 1988

APPENDIX N

MICHAEL J. GREEN	*	15th JUDICIAL DISTRICT COURT,
VS. NO. 85-7722-J	*	IN AND FOR THE PARISH OF
INDUSTRIAL HELICOPTERS, INC.	*	LAFAYETTE, STATE OF LOUISIANA

REASONS FOR JUDGMENT

This matter was tried in Lafayette, Louisiana on May 3, 1988 and was submitted for a decision after receipt of post-trial memoranda from all counsel.

PRESENT: MR. KARL BENGTSON, for plaintiff, MICHAEL J. GREEN;

MR. CHARLES R. SONNIER, for defendants, INDUSTRIAL HELICOPTERS, INC. and DOUG WRIGHT; and

MR. NICHOLAS GACHASSIN and MS. LELIA COLLIER, for intervenors, SOUTHERN PETROLEUM LABORATORIES and UNITED STATES FIDELITY AND GUARANTY COMPANY.

Plaintiff, Michael J. Green, has filed suit against Industrial Helicopters, Inc. and Doug Wright for personal injuries sustained in a helicopter crash which occurred in the Gulf of Mexico approximately ninety (90) miles south of

Lafayette on November 26, 1984. At the time of the accident, plaintiff was employed as an offshore meter technician by Southern Petroleum Laboratories, Inc., who had contracted with Industrial Helicopters, Inc. for transport of its employees throughout the Gulf.

Based upon the evidence and testimony at trial, the Court makes the following findings of undisputed facts:

(1) On November 26, 1984, plaintiff and pilot Doug Wright left Picard Park in Milton, Louisiana in a Bell 206B aircraft owned by Petroleum Helicopters. In route to two (2) platforms in the High Island area, the craft stopped for refueling at the Exxon West Cameron 616 Platform.

(2) Shortly after taking off from the Exxon platform, the helicopter became disabled, and the pilot was forced to make an emergency landing in eight to ten foot seas.

(3) Plaintiff and the pilot were rescued by Exxon employees, who voluntarily launched an escape pod from Platform 616.

(4) The accident occurred in the course and scope of the Plaintiff's employment with Southern Petroleum Laboratories, Inc.

(5) At the time of trial, intervenor, U.S.F. & G. had paid plaintiff a total of $47,737.63 in compensation benefits and $18,747.75 in medical expenses, pursuant to the Longshoremen and Harbor Workers' Compensation Act.

The disputed issues at trial were the cause of the crash, the severity of the helicopter's impact with the water and the extent of the plaintiff's injuries.

Pilot Doug Wright testified that the take off from the Exxon platform was normal. Shortly thereafter, however, he began experiencing engine RPM fluctuations, which in turn brought about a decline in rotor RPMs. He explained that the craft could not maintain its altitude without 100% rotor RPMs. By decreasing pitch, the pilot was able to maintain constant 100% rotor RPMs. Because he still had partial engine power he testified that the craft did not go into a full auto-rotation before landing on the water. Hence, he was able to stop the craft's rate of descent so that it was "almost in a hover," thereby producing a normal landing about forty-five (45) seconds after the initial trouble started.

During this short period of time—as the plaintiff himself testified—Mr. Wright was able to maintain the aircraft in an upright position, inflate the pontoons and brief his passenger on emergency procedures. In the Court's opinion, Mr. Wright's handling of this emergency situation was extraordinary. Accordingly, the Court finds that pilot error was not a factor in this crash.

Based upon the testimony of Mr. Wright—which was uncontroverted regarding the craft's malfunction—the Court finds that the sole and proximate cause of the crash was the mechanical failure of the aircraft's governor—the device which controls the engine RPMs. Mr. Wright's version of the events immediately prior to impact is consistent with the explanation given by Mr. Craig Isak, a helicopter mechanic, who stated that without a properly functioning governor, the craft could not maintain altitude.

Plaintiff has alleged that defendants were negligent in failing to discover the defective governor by proper inspection. For the following reasons, the Court rejects this claim. Mr. Isak, a mechanic employed by Industrial Helicopters testified that the aircraft was routinely checked everyday, with a more detailed inspection every one hundred (100) hours of flying time. The last inspection of this helicopter—completed twenty (20) days before the crash—was done at 4618 hours flying time. On the day of the crash, the craft had logged only 4639 flying hours. Therefore, the next inspection was not due until another seventy-nine (79) hours. Additionally, Mr. Isak testified that the governor was a sealed unit not subject to internal inspection. Any problems could only be detected by pilot complaint. Furthermore, Industrial Helicopters, Inc. did not perform any repairs on the governor, which had to be sent to a special facility for maintenance. Based upon the above, the Court finds that Industrial Helicopters was not negligent in the inspection of its helicopter and that it was not possible for the defendant to have discovered the defective governor since no problem of this nature had been reported.

Although the plaintiff has failed to prove any negligence of Industrial Helicopters, Inc. in the care and operation of its helicopter, the defendant is nonetheless liable for any damages caused by a defective thing in its care, custody or control under Louisiana Civil Code Article 2317. The Court has already determined that the cause of the crash was the mechanical failure of the craft's governor, which created an unreasonable risk of harm to the occupants of the helicopter. Hence, the Court must now determine the extent of the damages, if any, that were caused by this defect.

The testimonies of the plaintiff and the pilot differ as to the severity of the helicopter's impact with the water.

According to the pilot, he was able to reduce the craft's rate of descent to almost zero, thereby producing a "soft" landing at the top of one of the swells. The plaintiff, however, described the descent as "vigorous and jarring," with the disabled craft slamming into the water at the bottom of a swell. Mr. Wright, a pilot with over 7000 hours of flying time and who had faced similar emergency situations, stated this landing was unremarkable. However, the Court finds that during the descent and the landing in eight (8) to ten (10) foot seas, the plaintiff was probably thrown forward and somewhat jolted, although he testified he did not strike any objects while still in the helicopter. Plaintiff did state, however, that he struck his chin on the escape capsule as Exxon personnel pulled him out of the water.

Defendants claim that they are not responsible for plaintiff's injuries because the negligence of Exxon employees in dropping plaintiff against the rescue capsule constitutes an intervening cause which absolves them from liability. The Court rejects this claim for two (2) reasons. First, negligence on the part of any Exxon personnel was never proven at trial. The rescue operation, in rough seas, was dangerous to both the Exxon employees and to Mr. Wright and Mr. Green. The fact that plaintiff may have been jostled about in these weather conditions does not establish that the rescuers breached any duty which they voluntarily assumed. Second, the events in the water occurring immediately after the crash do not meet the legal requirements of an intervening cause. To break the chain of causation, the act which causes damage must be totally independent of the tortfeasor's conduct. In this case, however, the rescue at sea was not only a foreseeable consequence of the crash, but was in fact merely a continuation of the events set into motion by the failure of the aircraft of defendant Industrial Helicopters.

Plaintiff claims to have suffered an injury to his temporomandibular joint (TMJ) and a soft tissue injury to his neck as a result of the helicopter crash and the ensuing rescue. Immediately after the accident he was treated for neck and shoulder complaints by Dr. Pat Sonnier. Dr. Sonnier then referred plaintiff to Dr. Thomas Laborde, a physical medicine and rehabilitation specialist, who treated plaintiff until January of 1988. Dr. Laborde observed tension, or involuntary muscle spasms, in plaintiff's neck. Negative results in diagnostic tests such as a myelogram and an EMG ruled out the possibility of a herniated disc and led Dr. Laborde to diagnose plaintiff's condition as chronic myofacial pain in the neck and shoulder area of which the TMJ problem is a component. This diagnosis was later verified by a thermogram. Dr. Laborde was unable to control plaintiff's neck pain. In his opinion, one explanation for this failure would be a structural problem with plaintiff's temporomandibular joint.

Dr. Joseph William Barrios, an expert in dentistry and TMJ problems, treated plaintiff from January 15, 1985 through June, 1985. During this time, plaintiff complained of headaches on a daily basis, difficulty in swallowing, jaw pain, and clicking and locking of the jaw. Dr. Barrios' objective findings included bilateral popping of the jaw, an opening and closing click and lateral movement of the jaw. These symptoms, as well as plaintiff's extreme sensitivity in the jaw area, indicated an internal derangement in plaintiff's jaw. Dr. Barrios' treatment included physical threapy, cortisone injections at trigger points and a splint, which plaintiff wore at all times, that was designed to recapture the TMJ disc to its normal position. After six (6) months, this treatment produced no major improvement. Dr. Barrios then referred plaintiff to Dr. Randolph Malloy, an oral and maxillofacial surgeon.

Dr. Malloy treated plaintiff from September 6, 1985 through November of 1987. He prescribed a new splint and taught plaintiff how to manipulate his jaw by hand to increase the space in his jaw joint. This treatment produced some intermittent success, with plaintiff's own estimation of his condition improving as much as seventy percent (70%). However, throughout this period, Dr. Malloy observed a decreasing range of movement in the jaw and noted that on several occasions plaintiff could not open it all. In Dr. Malloy's opinion, plaintiff is currently a candidate for surgery which could cost approximately $15,000.00.

Industrial Helicopters contends that plaintiff's medical problems were not caused by the helicopter crash of November 26, 1984. Defendant claims first that plaintiff's TMJ problems predated the accident and second that an automobile accident in December of 1987, in which plaintiff who was knocked unconscious, is the cause of his current condition.

Both Drs. Malloy and Barrios observed that plaintiff was missing eight (8) teeth and that he had a crossbite. Both concluded that these conditions could lead to TMJ problems by themselves even if the patient did not suffer any type of trauma. However, no evidence was presented at trial which suggested that plaintiff experienced any objective TMJ symptoms before the accident. The Court, therefore, finds that while plaintiff may have been susceptible to TMJ problems before the crash, the trauma and the tension associated with the accident of November 26, 1984 activated the symptoms from which he now suffers.

Nor does the Court accept defendant's claim that plaintiff's current condition was caused by the automobile accident of December, 1987. The record reflects that plaintiff experienced severe TMJ problems long before this acci-

dent. The Court particularly notes Dr. Malloy's observation that throughout the course of his treatment, the plaintiff continued to experience a decreasing range of motion in his jaw joint. This leads the Court to conclude that, while plaintiff was able to better manage his pain as a result of Dr. Malloy's treatment, no substantial change occurred in the nature of plaintiff's problem.

Plaintiff has also made substantial claims for loss of enjoyment of life, including the deterioration of his marriage, and loss of past and future wages.

The Court does not accept plaintiff's claim that his injuries were the primary cause of the break-up of his marriage. Plaintiff and his wife, Gwen, are currently separated, with no plans of reconciliation. The Court does not find that plaintiff's lifestyle has changed significantly since the accident, particularly in his inability to engage in sporting activities which he enjoyed prior to the accident.

Plaintiff seeks an award of $225,000.00 in economic damages, with $66,400.00 representing past lost wages from the date of the accident through the trial. At the time of the accident, plaintiff was employed as an offshore meter technician with an annual salary of $26,680.00. After the accident, he continued to work on light duty for approximately four (4) to five (5) months until he was laid off. He then attended a two (2) year program in electronics and is now employed as a solid state technician by MASCO, Inc. earning $17,700.00.

The Court finds that plaintiff is disabled from his former occupation, which involved lifting heavy equipment and tools. Nonetheless, plaintiff was capable of working after the accident, and he currently has a secure job. Furthermore, plaintiff has not shown that he would have been

able to continue as an offshore technician with Southern Petroleum Laboratories in the recent economic climate. Accordingly, the Court must partially discount his large claim for economic damages.

Plaintiff also seeks damages from Industrial Helicopters for interference with his current employment based on the doctrine of abuse of rights. He claims that Mr. Oran Richard, the owner of Industrial Helicopters, contacted his current employer in an attempt to punish him for filing this suit. The Court finds that Mr. Richard's motivation for contacting plaintiff's employer was purely economic. MASCO, Inc. performed electrical services on equipment owned by Industrial Helicopters and Mr. Richard, who did not know plaintiff personally, was concerned for the safety of his equipment during this pending litigation. Additionally, plaintiff has failed to prove any damages resulting from Mr. Richard's conduct because he retained his job. Therefore, this claim is denied.

The Court accordingly grants judgment in favor of plaintiff, Michael Green, against defendant, Industrial Helicopters, Inc., in the following amounts:

(1)	General Damages, which include mental anguish, physical suffering and loss of enjoyment of life.	$ 40,000.00
(2)	Economic damages, past and future.	$ 25,000.00
(3)	Medical Expenses, past.	$ 18,747.75
(4)	Medical Expenses, future.	$ 15,000.00
	Total	$ 98,747.75

together with legal interest thereon from date of judicial demand, until paid.

Plaintiff's claim against defendant Doug Wright is dismissed.

Intervenor U.S.F. & G.'s claim in the amount of $66,485.38 is hereby recognized and is payable to the extent that this Court has awarded damages for economic loss and medical expenses.

Costs are to be borne two-thirds (2/3) by defendant, Industrial Helicopters, Inc. and one-third (1/3) by plaintiff, Michael Green.

Judgment will be signed upon presentation.

Thus Rendered and Signed in Chambers, at Crowley, Louisiana this 1st day of June, 1988.

/s/ Don Aaron, Jr.
DISTRICT JUDGE

Filed June 2, 1988

STATE OF LOUSIANA PARISH OF LAFAYETTE

I hereby certify that a certified copy of this judgment has been mailed, served on all parties this 3rd day of June, 1988.

/s/ Maria Randolph
By Clerk of Court

(4)

No. 91-1859

Supreme Court, U.S.
FILED
JUN 15 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

INDUSTRIAL HELICOPTERS, INC.,

Defendant-Petitioner,

versus

MICHAEL J. GREEN,

Plaintiff-Respondent,

UNITED STATES FIDELITY
& GUARANTY COMPANY,

Plaintiff/Intervenor-Respondent.

Petition For Writ Of Certiorari
To The Louisiana Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Nicholas Gachassin, Jr.
Bar No. 5867
Gachassin & Hunter
P. O. Box 2850
Lafayette, LA 70502
(318) 235-4576

Attorney for United States Fidelity & Guaranty Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

1. Whether Louisiana may supplement the general maritime remedies for actions in tort.

PARTIES TO THE PROCEEDING BELOW

All parties to the proceeding below appear in the style of this case. There are no parent or subsidiary companies to be listed pursuant to S.Ct. R. P. 29.1

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDING BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

SUMMARY OF ARGUMENT 2

LACK OF GROUNDS FOR JURISDICTION 2

28 USC 1257 2

SUPREME COURT RULE 14 3

SUPREME COURT RULE 10 4

THE REQUIREMENT OF SUBSTANTIALITY 5

MISSTATEMENTS OF LAW 7

BASIS FOR APPLICATION OF STATE LAW 7

SUPPOSED OPPOSITION OF MARITIME LAW .. 8

ANALYSIS OF LOUISIANA SUPREME COURT .. 8

ASKEW V. AMERICAN WATERWAY OPERATORS, INC. 9

SUPPOSED LACK OF AUTHORITY 10

UNSEAWORTHINESS 10

CONCLUSION 11

TABLE OF AUTHORITIES

Pages

CASES

Askew v. American Waterways Operators, Inc., 411 U.S. 325, 93 S.Ct. 1590 (1973) 6, 9, 10

Calder v. Jones, 465 U.S. 783 (1984) 3

Green v. Industrial Helicopters, 593 So.2d 634 (La. 1992) 5

Hanson v. Denckla, 357 U.S. 235 (1958) 3

Huron v. Portland Cement Company v. City of Detroit, 362 U.S. 440, 80 S.Ct. 813 (1960) 6

Just v. Chambers, 312 U.S. 383, 61 S.Ct. 687 (1941) 6

Memphis Natural Gas Company v. Beeler, 315 U.S. 649 (1942) 3

Miles v. Apex Marine Corporation, 111 S.Ct. 317 (1990) 5

New Orleans v. New Orleans Water Works, 142 U.S. 79 (1891) 5

Richmond v. Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 3

Skiriotes v. Florida, 313 U.S. 69, 61 S.Ct. 924, *rehearing denied*, 313 U.S. 599, 61 S.Ct. 1093 (1941) 6

Zucht v. King, 20 U.S. 174, 43 S.Ct. 24 (1922) 6

STATUTES

28 USC 1257A 2, 3, 11

46 USCA Section 688 5

Admiralty Extension Act 9

TABLE OF AUTHORITIES – Continued

Pages

Louisiana Civil Code Article 2317 ..... 2, 7

Water Quality Improvement Act of 1970 9

U.S. Supreme Court Rules

Rule 10.1(b) 4

Rule 10.1(c) 4

Rule 14 3

Treatises

Wiener, *"The Supreme Court's New Rules"* 68 Harv. L. Rev. 20, 51 (1954) 6

No. 91-1859

In The

Supreme Court of the United States

October Term, 1991

INDUSTRIAL HELICOPTERS, INC.,

Defendant-Petitioner,

versus

MICHAEL J. GREEN,

Plaintiff-Respondent,

UNITED STATES FIDELITY
& GUARANTY COMPANY,

Plaintiff/Intervenor-Respondent.

Petition For Writ Of Certiorari
To The Louisiana Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

UNITED STATES FIDELITY AND GUARANTY COMPANY, respondent and intervenor in this suit, respectfully prays that a writ of certiorari not be granted to the petitioner **INDUSTRIAL HELICOPTERS, INC.,** for the reasons listed below:

SUMMARY OF ARGUMENT

The fatal flaw in Industrial Helicopter's petition for writ of certiorari consists of the absence of any grounds for jurisdiction of this court. Although the petitioner sets forth the federal statute and Supreme Court Rules under which jurisdiction may exist, it never describes how the issues of this case bring those rules into play, nor does it identify any conflicting federal or state case law. More significantly, no substantial federal question is raised by the petitioner, as this court held in previous decisions that states can supplement general maritime law. In an attempt to rectify these defects, the petitioner misstates the law and the Louisiana Supreme Court's analysis.

I.

LACK OF GROUNDS FOR JURISDICTION

A. 28 USC 1257

The legislature of the United States has determined that the Untied States Supreme Court has jurisdiction under 28 USC 1257A when "the validity of a statute of any state is drawn in question on the ground of its being repugnant to the laws of the United States."

Petitioner dutifully sets forth this language; however, there is no mention in the statement of grounds for jurisdiction or in any other part of the petition, that the Louisiana statute is repugnant to the laws of the United States. On the contrary, while Louisiana Civil Code Article 2317, regarding strict liability, is cited by the petitioner, the validity of the Statute itself is never called into question. Rather, in general terms, the petitioner argues

that the application of the Louisiana statute was inappropriate in this case. Because the validity of the statute remains inviolate, jurisdiction is not automatic under the federal statute listed above, but is merely discretionary with this Court. *Memphis Natural Gas Company v. Beeler,* 315 U.S. 649, 650-51 (1942); *Hanson v. Denckla,* 357 U.S. 235, 244 (1958); *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 562 (1980); *Calder v. Jones,* 465 U.S. 783, 787 (1984).

Furthermore, 28 USC 1257A stipulates that jurisdiction exists if the validity of the statute "is drawn into question on the ground of its being repugnant to the laws of the United States". Although the petitioner asserts the conclusion that the addition of the remedy of strict liability would create a new federal maritime cause of action and that "remedies cannot make changes in substantive maritime law", the petition lacks any reference to a specific constitutional provision or federal statue with which this remedy conflicts. Nor does the petition define the "substantive maritime law" which this remedy would "change".

B. SUPREME COURT RULE 14

As stated above, one of the primary flaws in the petition for writ of certiorari remains that it never specifies which aspects of the federal law are in question. Rule 14 of this Court requires that the petitioner set forth,

> the Constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, setting them out verbatim and giving the appropriate citation therefore. If the provisions

> involved are lengthy, their citation alone will suffice at this point and their pertinent text must be set forth in the appendix to in sub-paragraph .1(k) of this rule. Rule 14 (f)

No such federal law is set forth anywhere in the petition. If the petitioner bases its request for writ of certiorari on the admiralty common law, it should at least set forth the jurisprudential rules or characteristics of that common law which are at stake in this case.

C. SUPREME COURT RULE 10

Although the petition sets forth the rules for consideration of petitions for writ of certiorari, it lacks any reference to adherence to these rules. Rule 10.1(b) allows consideration, "when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of the United States Court of Appeals". After minute inspection of the petition, counsel for respondent could find no reference to any federal appeals or state supreme court decision which conflicts with the Louisiana Supreme Court decision below.

Rule 10.1(c), also listed by the petitioner provides for consideration "when a state court or a United States Court of Appeals has decided an important question of federal law which has not been, but should be settled by this court, or has decided a federal question in a way that conflicts with the applicable decisions of this court". The petitioner never specifies whether it is attempting to base jurisdiction on the fact that a certain issue should be

settled by this Court, or whether Green conflicts with a prior decision of this Court.

However, in arguing that uniformity in maritime law must be upheld, the petitioner cites *Miles v. Apex Marine Corporation,* 111 S.Ct. 317 (1990). If this is the case on which petitioner relies for jurisdiction, this reliance is misplaced, for no conflict exists between *Miles* and the decision of the Louisiana Supreme Court in *Green v. Industrial Helicopters,* 593 So.2d 634 (La. 1992). In the case at issue here, the plaintiff merely seeks to adopt a state remedy in addition to those rights which he has under general maritime law. In contrast, *Miles v. Apex Marine, **supra,*** dealt with a very specific statutory provision, the Jones Act, 46 USCA Section 688. Because "Congress has spoken directly to the question of recoverable damages on the high seas" for seamen under the Jones Act, no supplementation of those remedies were allowable. *Miles,* 111 S.Ct. 317, at 325. However, this Court also recognized that when an area is left open by statute, "supplementation was entirely appropriate." ***Id.*** In this case, Congress has not spoken in regard to the damages allowable, and therefore *Miles* in no way conflicts with the lower court's decision.

D. THE REQUIREMENT OF SUBSTANTIALITY

The petitioner's request for writ of certiorari lacks substantiality. This Court, however, has recognized for over a century, that a federal question must be substantial to confer jurisdiction on the Supreme Court. *New Orleans v. New Orleans Water Works,* 142 U.S. 79 (1891). This Court has determined that substantiality remains a function of

how earlier decisions related to the same issue. See Wiener, "The Supreme Court's New Rules" 68 Harv. L. Rev. 20, 51 (1954); *Zucht v. King*, 20 U.S. 174, 43 S.Ct. 24 (1922).

In *Zucht*, San Antonio city ordinances provided for exclusion of children from school who could not provide a certificate of vaccination. This Court found that the validity of such ordinances under the Federal Constitution was not substantially at issue, because a significant number of prior cases had determined that such ordinances were allowable under the police power of a state.

Similarly, this Court has held in a variety of cases that a state may supplement General Maritime Law when the state action is not hostile to either the general principles of maritime law or to specific federal legislation. *Just v. Chambers*, 312 U.S. 383, 61 S.Ct. 687; *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 93 S.Ct. 1590 (1973); *Skiriotes v. Florida*, 313 U.S. 69, 61 S.Ct. 924, rehearing denied 313 U.S. 599, 51 S.Ct. 1093 (1941); *Huron v. Portland Cement Company v. City of Detroit*, 362 U.S. 440, 80 S.Ct. 813 (1960).

Because the petitioner has not explained which principles of maritime law have been violated, and as this Court has ruled in favor of additional state remedies in such cases, no real issue exists as to the federal question presented by the petitioner. Therefore, based on this lack, respondent, United States Fidelity and Guaranty Company, respectfully requests that this esteemed Court deny the petition for writ of certiorari.

II.

MISSTATEMENTS OF LAW

Although the petitioner presents a superficial view of the Louisiana Supreme Court's analysis, it also includes certain glaring misstatements that must be addressed here.

A. BASIS FOR APPLICATION OF STATE LAW

Petitioner begins its analysis with the assertion that the inclusion of Louisiana Civil Code Article 2317, in an admiralty tort suit, will lead to the application of each adjacent state's law "depending upon the fortuitous event of the site of the accident." If this Court will examine the facts of the case set forth in the record, it will see that a variety of factors were considered by the Louisiana Supreme Court in applying Louisiana's law to this case:

> Plaintiff is a Louisiana resident; Industrial (Helicopters), a Louisiana Corporation; the pilot, a Louisiana resident, and the helicopter was stored in a Louisiana hanger. The contract of carriage between plaintiff's employer and defendant was convicted in Louisiana, the mission started in Louisiana and was to end in Louisiana. (See petitioner's Appendix volume 1 page A-6.)

Obviously the site alone was not determinative of the law applied.

B. SUPPOSED OPPOSITION OF MARITIME LAW

In regard to the application of an adjacent state's law, petitioner goes on to argue that, "General Maritime Law has always been opposed to any such operation of law and this decision now sets these possibilities in motion." (Petition at 7). Not only does the petitioner not cite any case law to substantiate General Maritime Law's supposed opposition, but it also ignores those cases mentioned above, where an adjacent state was permitted to supplement Maritime law.

C. ANALYSIS OF LOUISIANA SUPREME COURT

Petitioner argues that the Louisiana Supreme Court analyzed the application of strict custodial liability law "by determining whether there is applicable federal legislation identifying the 'characteristic features in maritime law' and by examining the 'scope of the uniformity requirement'." In making this assertion, petitioner ignores the basic format of the Louisiana Supreme Court's argument. In introduction, the lower court first examined the law in regard to additional state remedies in terms of the "savings to suitors" clause and various case law. It also recognized the difficulty of finding a set rule for such remedies.

The Court then examined the application of an interest balancing test in regard to federal versus state law, and cited those cases where a strong state interest merited supplementation. The Court then went through a three step process to determine whether any conflict existed between federal and state law:

1) It determined whether there was applicable federal legislation.

2) It attempted to identify the "characteristics of maritime law".

3) It examined the scope of the uniformity requirement.

D. *ASKEW V. AMERICAN WATERWAYS OPERATORS, INC.*

In explaining the need to determine applicable federal legislation, the Court cited *Askew v. American Waterways Operators, Inc.*, ***supra,*** which held that "state regulation is permissible, absent a clear conflict with the federal law." *Askew,* 411 U.S. at 342, 93 S.Ct. at 1600. In its attack on the Supreme Court's analysis, petitioner insists that the "federal act specifically allowed supplementation by state regulations" and that it is therefore distinguishable from general maritime law. (Petition at 9, 10). What it ignores in this statement is that the Supreme Court was dealing with *two* federal acts in *Askew.* The first was the Water Quality Improvement Act of 1970; it was this act which allowed state regulation. However, in making its pronouncement that state regulation is permissible, this Court was dealing with the Admiralty Extension Act, which makes no reference to additional remedies. *Askew,* 411 U.S. at 341, 93 S.Ct. at 1600. Thus, petitioner ignores the extensive analysis of this Court in dealing with uniformity within the general maritime law and the achievement of that uniformity despite, and because of, supplementation by the states.

Petitioner also characterized *Askew* as a case in which the supplemental statute was the only remedy available. It attempts to distinguish this case by saying that federal admiralty tort laws provide Michael Green a remedy for recovery of damages. However, as the lower courts all found that the only basis of recovery for the plaintiff, Michael Green, was that of strict liability, this distinction must fail.

E. SUPPOSED LACK OF AUTHORITY

Petitioner claims that the Louisiana Supreme Court found that the General Maritime Law authorizes application of state strict liability "without any legal authoritative basis." (Petition at 10). This is a clear misstatement of the analysis of the Louisiana Supreme Court. The Petitioner's assertion refers to the Court's examination of the characteristic features of Maritime Law. In making that determination, the lower court examined the traditional remedies available at admiralty. After an extensive review of both statutory and case law, the court found that there was no hostility in these remedies to strict liability. Such a review does not constitute a lack of authoritative basis.

F. UNSEAWORTHINESS

Finally, the Petitioner argues that the Louisiana Supreme court incorrectly applied the doctrine of unseaworthiness. (Petition at 15) However, an examination of the lower court's opinion will reveal that it did not apply unseaworthiness to this action, rather it merely

examined unseaworthiness and other remedies in its search for the scope of the uniformity requirement.

CONCLUSION

This case should not be before this Court for a variety of reasons. The petition neglects the jurisdictional requirements of both 28 USC 1257A and the U.S. Supreme Court Rules. Also, prior U.S. Supreme Court decisions allowing supplemental state remedies make any federal issue presented here insubstantial. In an attempt to create substantiality, the petitioner has misstated both the law and the Louisiana Supreme Court's analysis of that law. Therefore, respondent United States Fidelity and Guaranty respectfully requests that this Court deny petitioner's request for writ of certiorari.

DATED this 15th day of June, 1992.

Respectfully submitted,

NICHOLAS GACHASSIN, JR.
La. Bar Roll #5867
GACHASSIN & HUNTER
P. O. Box 2850
Lafayette, LA 70502
(318) 235-4576

Attorney for Plaintiff-Intervenor/Respondent, United States Fidelity & Guaranty Company

SUPREME COURT, U.S.
FILED
JUN 19 1992
OFFICE OF THE CLERK

No. 91-1859

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

INDUSTRIAL HELICOPTERS, INC.,

Defendant-Petitioner,

v.

MICHAEL J. GREEN,

Plaintiff-Respondent.

UNITED STATES FIDELITY & GUARANTY CO.,

Plaintiff-Intervenor-Respondent.

ON WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

BRIEF OF PLAINTIFF-RESPONDENT IN OPPOSITION

KARL W. BENGTSON
Louisiana Bar # 2942
SHELTON AND LEGENDRE
2448 Johnston Street
Post Office Drawer 52548
Lafayette, Louisiana 70505
(318) 233-7084

Attorneys for Plaintiff-Respondent, Michael J. Green.

June 19, 1992

Washington, D.C. • THIEL PRESS • (202) 328-3266

QUESTION PRESENTED

Whether a substantial federal question is raised by the Louisiana Supreme Court's application of Louisiana Civil Code Article 2317 to a personal injury claim which involves three citizens of Louisiana, and arising out of a contract for carriage confected in Louisiana for a flight to begin and end in Louisiana by means of a helicopter hangared and maintained in Louisiana, but which accidentally terminates in the Gulf of Mexico?

TABLE OF CONTENTS

Page

QUESTION PRESENTED. i

TABLE OF CONTENTS. ii

TABLE OF AUTHORITIES ii

OBJECTON TO PETITIONER'S FORMULATION OF

A. Questions Presented. 2

B. Statement of the Case 2

C. Appendix. 4

STATEMENT OF THE CASE 4

SUMMARY 6

ARGUMENT 7

CONCLUSION 16

TABLE OF AUTHORITIES

– Cases –

U.S. Supreme Court:

Howlett by and through Howlett v. Rose, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990). 8

Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 108 S.Ct. 1704, 110 L.Ed.2d 158 (1988) 8

Offshore Logistics, Inc. v. Tallentire, 477 U.S. 217, 106 S.Ct. 2485, 88 L.Ed.2d 48 (1986) 12, 13

International Longshoreman's Assoc. v. Davis, 476 U.S. 380, 106 S.Ct. 1904, 90 L.Ed.2d (1986). 8

Herb's Welding, Inc. v. Gray, 470 U.S. 414, 105 S.Ct. 1421 (1985). 15

Xerox Corp. v. Harris County, TX, 459 U.S. 145, 103 S.Ct. 532, 74 L.Ed.2d 323 (1984) 8

Mobil Oil Corp. v. Hibbinbotham, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978) 12

Askew v. American Waterways Operators, Inc., 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed.2d 280 (1973) 6, 12, 13

Cases, U.S. Supreme Court, continued: Page

Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306, 90 S.Ct. 1731 (1970) 15

Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960) 13

Romero v. Internationl Term. Oper. Co., 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 769 (1959) 6, 14

Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955) 13

Wilson v. Cook, 327 U.S. 474, 66 S.Ct. 663 (1946) 8

Skiriotes v. Florida, 313 U.S. 69, 61 S.Ct. 924 (1941) 6, 13

Just v. Chambers, 312 U.S. 383, 61 S.Ct. 687 (1941) 13, 14

Kelly v. Washington, 302 U.S. 1, 58 S.Ct. 87, 82 L.Ed. 3 (1937) 13

Clyde Mallory Lines v. Alabama, 296 U.S. 261, 56 S.Ct. 194, 80 L.Ed. 215 (1935) 13

Red Cross Line v. Atlantic Fruit Company, 264 U.S. 109, 44 S.Ct. 274 (1923) 13

Zucht v. King, 260 U.S. 174, 43 S.Ct. 24 (1922) 9

Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469, 42 S.Ct. 157 (1922) 15

Chicago, Rock Island & Pacific Railroad Co. v. Wright, 239 U.S. 548, 36 S.Ct. 185 (1915) 9, 11

Los Angeles Farming & Milling Co. v. City of Los Angeles, 217 U.S. 217, 30 S.Ct. 452 (1909) 8

Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 29 S.Ct. 220 (1908) 8, 9

Equitable Life Assurance Society v. Brown, 87 U.S. 308, 23 S.Ct. 123 (1902) 8

U.S. Courts of Appeal:

Pacific Merchant Shipping Assn. v. Aubry, 918 F.2d 1409 (9th Cir., 1990), cert. den., #91-349, June 11, 1992 . . 13, 15

Brockington v. Certified Elec. Co., 903 F.2d 1523 (11th Cir., 1990), cert. den., 111 S.Ct. 676. 13

Cases, U.S. Courts of Appeal, continued: Page

Protectus Alpha Nav. v. N. Pacific Grain Grow, 767 F.2d 1379 (9th Cir., 1985) 12

Steuart Transp. v. Allied Towing Corp., 596 F.2d 609 (4th Cir., 1979) 12

The New York Central No. 18, 257 F. 405 (2nd Cir., 1919) 12

The Chauncey M. Dupew, 139 F. 236 (2nd Cir. 1905) 12

– *Statutes* –

28 USC 1257(3) 7

Death on the High Seas Act (DOHSA), 46 USC 761, et seq. 12, 13

Outer Continental Shelf Lands Act, 43 USC 1222, et seq. 3, 10, 11, 16

Louisiana Civil Code Article 2317. . . . . *passim*

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

INDUSTRIAL HELICOPTERS, INC.,

Defendant-Petitioner,

v.

MICHAEL J. GREEN,

Plaintiff-Respondent.

UNITED STATES FIDELITY & GUARANTY CO.,

Plaintiff-Intervenor-Respondent.

ON WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

BRIEF OF PLAINTIFF-RESPONDENT IN OPPOSITION

Plaintiff-Respondent respectfully suggests that this Court should refuse to grant certiorari in this matter. The instant case does not fall within the jurisdiction *exercised* by this Court. There are certainly federal maritime issues involved herein, however, they do not constitute "substantial federal questions".

In addition to this suggestion of lack of jurisdiction, Plaintiff-Respondent raises objections to the Defendant-Petitioner's formulation of the Question Presented, its Statement of the Case, and its Appendix.

OBJECTION TO PETITIONER'S ASSERTION OF THE QUESTIONS PRESENTED

Defendant-Petitioner has asserted that this Court is called upon to determine "whether Louisiana can create a new maritime cause of action". The court below did not "create a new maritime cause of action", nor did it base its decision on an expansion of maritime law. Rather it reasoned that La. C.C. art. 2317 was not excluded by contrary federal legislation, by the characteristic features of the general maritime law, nor by required maritime uniformity (Appendix A, p. A-20). The decision of the Louisiana Supreme Court below specifically provides that:

> . . . we . . . hold that Article 2317 applies as a supplement to the remedies available under the general maritime law in this maritime personal injury case, *since Article 2317 does not impermissibly conflict with the substantive general maritime law.* (Appendix A. p. A-2, emphasis added).

Since Louisiana law was not excluded, Article 2317 affords plaintiff a remedy in this action.

OBJECTION TO PETITIONER'S STATEMENT OF THE CASE

Defendant-Petitioner has failed to include in its Statement of the Case the facts which were of primary import to the courts below in reaching its decision.

> Louisiana has a strong interest in applying its own law in this case: Plaintiff is a Louisiana resident,

> Industrial a Louisiana corporation, the pilot a Louisiana resident, and the helicopter was stored in a Louisiana hangar. The contract of carriage between plaintiff's employer and defendants was confected in Louisiana. The mission started in Louisiana and was to end in Louisiana. Plaintiff and defendants, more likely than not, expected to be governed by Louisiana law. (Appendix A, p. A-6).

Other facts specifically cited by the courts below but deleted from Petitioner's Statement of the Case are that the accident occurred off the coast of Louisiana and shortly after the helicopter was refueled at an Exxon platform, off the Louisiana coast (Appendix A, p. A-2, 3). The platform is an artificial island used for oil and gas exploration and production. It is governed by the law of Louisiana as surrogate federal law per the mandate of OCSLA.

Petitioner's Statement of the Case is also deficient in that it fails to make clear that maritime law was never raised until after Defendant-Petitioner had lost at trial and on its appeal to the Louisiana Court of Appeals. Plaintiff did not bring his action under maritime law, nor did Defendant-Petitioner raise maritime law before the trial court. Plaintiff's petition made no reference to maritime law. Defendant-Petitioner's answer made no reference to maritime law. Pre-trial briefs and post-trial briefs by all parties made no reference to maritime law. Plaintiff's appeal made no reference to maritime law. Defendant-Petitioner itself filed an Answer to Appeal, seeking affirmative relief, asserting *state law* defenses, not maritime law. Only after it was denied relief under state law, did Defendant-Petitioner attempt to avoid liability by raising maritime law.

OBJECTION TO PETITIONER'S APPENDIX

Plaintiff-Respondent objects to the inclusion in the Appendices, of copies of Defendant-Petitioner's Appellate briefs while excluding therefrom copies of the Appellate briefs of Plaintiff-Respondent and of Plaintiff-Intervenor-Respondent.

STATEMENT OF THE CASE AND ACTION OF THE COURTS BELOW

On November 26, 1984, MICHAEL J. GREEN was employed by Southern Petroleum labs. His employer contracted with Industrial Helicopters, Inc. for helicopter transport for Mr. Green. The pilot was Industrial Helicopter's employee, Doug Wright. Both companies and both individuals are domiciled in Lafayette Parish, Louisiana. The helicopter was hangared, inspected and maintained by employees of Industrial Helicopters at its facilities in Lafayette Parish, Louisiana. The flight was to begin in Milton, Lafayette Parish, Louisiana, fly to offshore platforms, and return to Milton. En route, the helicopter refueled at a fixed offshore platform located off the coast of Louisiana. Shortly after lifting off, and as a result of a mechanical failure of the helicopter's governor mechanism, the craft was forced to make an emergency landing (crash) into the Gulf. MICHAEL GREEN suffered injuries.

Mr. Green remained under medical care in Lafayette from the date of the crash at least through the trial of this matter in May, 1988. Due to residual disabilities from his injuries, Mr. Green received assistance from the Louisiana Vocational Rehabilitation office, and retraining for a new job at Lafayette Regional, a state trade school. Subsequently, he obtained employment within his physical limitations at a Lafayette company.

On November 25, 1985, Mr. Green filed this action before the Louisiana 15th Judicial District Court, Parish of Lafayette. The defendants answered and the compensation carrier, intervened. Trial without jury was concluded on May 4, 1988, after which all parties submitted Post-Trial Memoranda. The Judge found INDUSTRIAL HELICOPTERS liable pursuant to Louisiana Civil Code Article 2317. Judgment was entered on July 8, 1988.

Plaintiff and intervenor filed appeals seeking an increase and re-apportionment of damages. INDUSTRIAL HELICOPTERS filed an Answer to Appeal, asserting state law defenses to dismiss plaintiff's claims and/or reduce the damage award. On April 18, 1990, the Louisiana Court of Appeals, Third Circuit sustained liability pursuant to Article 2317 and increased the damage award. INDUSTRIAL HELICOPTERS filed an Application for Re-hearing on May 2, 1990, *for the first time raising maritime law.* The Application was refused on May 22, 1990 and defendant sought writs. Due to a conflict between panels of the lower court, the Louisiana Supreme Court summarily remanded for further proceedings. The Third Circuit, *en banc,* on March 13, 1991, held that Article 2317 was precluded by maritime law. MICHAEL J. GREEN sought relief and the Supreme Court reversed, holding that the dispute was more local than maritime and that the parties were to be governed by local law. The court below found no support for defendant's claim that the relief provided by Article 2317 was repugnant to maritime law, or that it impermissibly impairs maritime uniformity.

SUMMARY

The dispute in this matter is essentially local and involves maritime law only by virtue of the fortuitous circumstance of the mechanical failure occurring while the helicopter was over navigable waters. The court below has correctly determined that state statutory remedies are available in disputes between its citizens in which there is a strong state interest, even though the dispute is also cognizable under maritime law. This Court has already held that a state may apply its laws to its citizens while on the high seas *Skiriotes v. Florida,* 313 U.S. 69, 61 S.Ct. 924 (1941); that it may exercise its police powers in marine venues *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed.2d 280 (1973); and that its laws may supplement (or actually preempt) maritime law where there is a great state interest in the dispute *Romero v. International Term. Oper. Co.*, 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 769 (1959). The court below properly found that Louisiana has a great interest in the application of its law to this dispute, and that in doing so, it does not impermissibly prejudice the characteristics of maritime law, nor does it impair any required uniformity. This Louisiana non-maritime worker, injured in an accident in a Louisiana helicopter over navigable waters off Louisiana's shores, while in transit from a fixed oil production platform on the Outer Continental Shelf may assert a cause of action under Louisiana law. Since there is no federal statute or principle of maritime law that prohibits the type of state liability asserted here, there is no substantive interference with maritime law. Accordingly, this case does not warrant discretionary review.

ARGUMENT

The decision below expressly addresses the interplay between a Louisiana tort statute and federal maritime law with respect to recovery for personal injuries. As described by the court below:

> The narrow question presented in this case is whether Louisiana Civil Code article 2317, which imposes liability for injury causing things in one's custody, is applicable in a case cognizable in admiralty but brought in a Louisiana state court pursuant to the "savings to suitors" clause of the Judiciary Act of 1789 as amended.[1] (Appendix A, p. A-1)

That court held that the plaintiff was entitled to recovery under the statute for injuries he sustained in an offshore helicopter accident. The court below concluded that:

> [T]here is no applicable contrary federal legislation and that La. C.C. art. 2317 neither prejudices the characteristic features of the general maritime law nor interferes impermissibly with any required uniformity of such law. (Appendix A, p. A-20).

This decision, although it addresses federal maritime law, raises no *substantial* federal questions that bring it within the jurisdiction of the U.S. Supreme Court under 28 USC 1257(3).

To be reviewable by the Supreme Court, a final judgment of a state's highest court must present a "substantial" federal question. *Equitable Life Assurance Society*

---

[1] Plaintiff did not plead maritime law, nor did he seek any form of maritime relief. Similarly, the Defendant-Petitioner's pleadings did not raise any maritime issues. Both parties asserted the rights and defenses available to them under state law. This dispute was tried under state law and appealed under state law. Only after the first appeal was lost, did Defendant-Petitioner seek to raise the maritime law exclusion.

v. Brown, 87 U.S. 308, 23 S.Ct. 123, (1902); *Waters-Pierce Oil Co. v. Texas,* 212 U.S. 86, 29 S.Ct. 220, (1908); *Los Angeles Farming & Milling Co. v. City of Los Angeles,* 217 U.S. 217, 30 S.Ct. 452, (1909). In its assessment of "substantiality" this Court should consider whether, in order to safeguard a federally protected right, or to preserve the integrity of federal law, it is necessary to reverse the Louisiana Supreme Court. This case does not deal with issues which this Court has commonly found to involve substantial federal questions.

The ruling of the court below does not involve the federal constitutionality of a state statute, *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 108 S.Ct. 1704, 110 L.Ed.2d 158 (1988). It does not involve a state court's failure to address available federal law urged before that court, *Howlett by and through Howlett v. Rose,* 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990). It does not involve comprehensive federal statutory preemption, *Xerox Corp. v. Harris County, TX,* 459 U.S. 145, 103 S.Ct. 532, 74 L.Ed.2d 323 (1984). It does not involve preservation of a federally protected right, *International Longshoreman's Assoc. v. Davis,* 476 U.S. 380, 106 S.Ct. 1904, 90 L.Ed.2d 389 (1986). This case is one involving the construction[2] of state law as permitted by federal maritime law, applied to a particular and local fact situation. *Wilson v. Cook,* 327 U.S. 474, 66 S.Ct. 663 (1946).

---

[2]This type of case is to be distinguished from those where the state court has ruled on the validity, or constitutionality, of a statute. This Court will more readily exercise jurisdiction when the validity of statutes are called into question. When the decision rests or can rest on state law grounds, the Court will review the "adequacy" of the state law basis for the judgment before deciding whether to exercise jurisdiction or not.

If the state court judgment is based on state law in lieu of federal law, this Court has not found "substantiality" when the matter is one of harmless or non-prejudicial error, *Chicago, Rock Island & Pacific Railroad Co. v. Wright*, 239 U.S. 548, 36 S.Ct. 185 at p. 186 (1915); or one clearly foreclosed by prior decision of this Court, *Equitable Life, supra.* Inherent in the decisions of this Court are rejection of writ petitions when state courts' analysis of specifically addressed federal questions are correct, *Zucht v. King*, 260 U.S. 174, 43 S.Ct. 24 at 25 (1922). In its review, this Court will not go beyond the state court's analysis of the federal law, i.e., it will not indulge in a reexamination of the state court's factual determinations. Nor will this Court review the state court's construction and application of state law, it will accept them without further analysis.

The determinations of fact and constructions of state law[3] made by the courts below, include:

1. Louisiana has paramount interest in this case due to its actual connections to the dispute involved. The parties were all Louisiana residents, the aircraft was hangared in the state, the contract for the carriage was confected there, the transport originated from and was to return to Louisiana, and the parties expected to be governed by Louisiana law. (Appendix A, p. A-6)

2. The elements of proof required by La. C.C. art. 2317 were property proven by plaintiff's evidence at

---

[3] The trial court's determination of liability pursuant to La. C.C. art. 2317, including the defective condition of the aircraft, causal link to injury and damages (Appendix M, pp. A-163-5) was sustained by the state intermediate appellate court below. (Appendix L, pp. A-153-5, Appendix A, p. A-21). The Louisiana Supreme Court did not reconsider these findings.

the trial. Defendant-Petitioner failed to present evidence sufficient to sustain its burden of proof in the state law defenses it asserted at trial. (Appendix N, pp. A-168 to 170, Appendix L, pp. A-153 to 156).

3. La. C.C. art. 2317 creates a form of strict liability which is similar to, and compatible with remedies available under maritime law. Maritime law encompasses principles of strict liability for defective products and unseaworthy vessels. (Appendix A, p. A-15).

These matters are established for purposes of the review by this Court. The federal questions to be assessed by this Court in deciding whether to grant the writ requested herein are:

Was the Louisiana Supreme Court in error in holding:

1. That the Outer Continental Shelf Lands Act, 43 USC 1222, et seq (which would specifically adopt Louisiana law) is inapplicable to this case?

2. That general principles of maritime law are not materially prejudiced by the strict custodial liability provisions of La. C.C. art. 2317?

3. That local state law may be relied on as a supplement to maritime law where there is a great state interest?

4. That La. C.C. art. 2317, when applied to a non-maritime worker injured in a helicopter accident, does not impermissibly interfere with required maritime uniformity?

The court below found no federal legislation applicable in this case which would preclude application of Louisiana law. It found that OCSLA was the only *potentially* applicable federal statute, but that in this case, it was not applicable. (Appendix A, p. A-9). However, if OCSLA is

here applicable, it specifically "adopts state law as surrogate federal law," thus incorporating the very remedy applied by the court below. Justice Watson, of the court below, concurring in the result, opined that OCSLA is applicable to this accident. (Appendix A. p. A-22 to 23). However, this issue alone should not constitute a "substantial" federal question. The application of Louisiana law through operation of OCSLA would have the same result as the lower court's decision. The court below held that Louisiana law applied to this dispute of its own power because it was not excluded by federal leglsiation or maritime law. If the court below erred, and OCSLA properly "adopts" state law herein, the identical result is obtained, and the error is non-prejudicial. It would be a waste of this Court's limited resources to consider this issue unessential to the final outcome. *Chicago, R.I. & P. RR Co., supra,* 36 S.Ct. 185 at p. 186, (1915).

The court below found no general principles of maritime law to prohibit plaintiff from receiving the benefit of Louisiana's substantive law remedy. Admiralty courts have asserted jurisdiction over offshore aircraft accidents; however, maritime law is not directed to governing aircraft operations. (Appendix A. pp. A-13, A-14). Maritime law dealing with vessel passengers has not been fixed by this Court, although the appeals courts permit recovery for negligence. However, plaintiff was not injured aboard a vessel, the traditional subject of maritime law, as the courts have refused to equate helicopters to vessels. Nowhere in maritime law is there a prohibition against a state imposing strict liability against the owner/operator of a defective helicopter located in that state. No general principle of maritime law permits a helicopter owner/operator to fly a defective aircraft and escape liability to his passenger. There is no maritime provision

granting a helicopter owner/operator immunity from state law liabilities when they fly over navigable waters. Maritime law does not grant a limitation of liability to aircraft owners. This Court has addressed offshore helicopter accidents, but only to determine whether the Death on the High Seas Act (DOHSA), 46 USC 761, *et seq.* precludes state *wrongful death* claims. *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978), *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 217, 106 S.Ct. 2485, 88 L.Ed.2d 48 (1986). Petitioner asserts that maritime law includes a "requirement of the proof of negligence", yet fails to offer any jurisprudence to support its assertion. Its failure to offer any supporting citations is due to the absence of any legal support for its position. Maritime law does not require proof of negligence, and it is not materially prejudiced by application of Article 2317 to these parties in this dispute.

The fact that 2317 establishes a form of strict liability does not conflict with any principle of maritime law. As shown above, maritime law includes forms of strict liability. Strict civil liability created by Florida and Virginia pollution control acts has been permitted. *Askew, supra, Steuart Transp. v. Allied Towing Corp.,* 596 F.2d 609 (4th Cir., 1979). In *Protectus Alpha Nav. v. N. Pacific Grain Grow,* 767 F.2d 1379 (9th Cir., 1985), the Court held that the defendant shipowner's violation of Washington statutes prohibiting interference with, or disobeyance of a public fireman, supported a finding of negligence per se. The Court specifically rejected defendant's argument that the application of these Washington state statutes was violative of federal maritime law. *The New York Central No. 18,* 257 F. 405 (2nd Cir., 1919) and *The Chauncey M. Dupew,* 139 F. 236 (2nd Cir., 1905), held

that a New York statute imposing strict liability on vessels moored at the end of wharfs in the East River was enforceable in Admiralty.

There being no maritime repugnance to La. C.C. art. 2317, the court below found that state law supplementation of maritime law is permissible. This Court has permitted supplementation by the States, especially where there is a great state interest in the dispute (Appendix A, pp. A-4 to 7). Maritime supplementation is permissible even where state strict liability law is involved. *Askew, supra,* Florida strict liability for marine pollution. Other cases permitting specific state supplemental remedies or regulation include: *Red Cross Line v. Atlantic Fruit Company,* 264 U.S. 109, 44 S.Ct. 274 (1923), New York law of specific performance of an arbitration clause; *Clyde Mallory Lines v. Alabama,* 296 U.S. 261, 56 S.Ct. 194, 80 L.Ed. 215 (1935), Alabama law creating port safety fees; *Kelly v. Washington,* 302 U.S. 1, 58 S.Ct. 87, 82 L.Ed. 3 (1937), Washington State's vessel seaworthiness and safety regulations; *Just v. Chambers,* 312 U.S. 383, 61 S.Ct. 687 (1941), Florida statute permitting survival actions; *Skiriotes, supra,* Florida sponge harvesting regulations; *Wilburn Boat Co. v. Fireman's Fund Ins. Co.,* 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955), Texas insurance laws limiting defenses from breach of insured's warranty; *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960), Detroit city smoke abatement ordinance; *Tallentire, supra,* citing general principles allowing supplementation but holding that DOHSA statutorily preempts a Louisiana wrongful death action. See too: *Brockington v. Certified Elec. Co.,* 903 F.2d 1523 (11th Cir., 1990), cert. den., 111 S.Ct. 676 (1991), Georgia Worker's Compensation Act excludes general maritime remedies to a

non-maritime worker injured while a passenger on a boat; *Pacific Merchant Shipping Assn. v. Aubry,* 918 F.2d 1409 (9th Cir., 1990), cert. den., #91-349, June 11, 1992, California overtime wage laws applied to seamen on vessels on the high seas but whose work was primarily involved in local pollution control work. There is no error, nor significant federal question, in state law supplementation of federal maritime law. It is clearly permissible where a state has a great interest in the dispute and neither federal statutory mandate nor principles of maritime law prohibit the state remedy in this case.

Lastly, the court below found that the application of La. C.C. art. 2317 in this case does not unduly impair requirements of uniformity in maritime law. Decisions of this Court have recognized that the need for uniformity still permits a wide scope of state regulations of maritime matters. Principles of federal/state comity are no less a part of maritime law than uniformity. The need for uniformity in maritime law is not as great in disputes only peripherally maritime. (Appendix A. pp. A-18 to 20). Since maritime law is not a complete. independent body of law, it is subject to supplementation by local law. Justice Frankfurter, in *Romero, supra,* 79 S.Ct. 468 at 480., wrote that:

> . . . to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and National Government in their regulation of maritime commerce.

The Supreme Court in *Just, supra,* 61 S.Ct. 687 at 691 (1941) has further explained that:

> . . . it is not a principle of our maritime law that a court of admiralty must invariably refuse to

> recognize and enforce a liability which the State has established in dealing with a maritime subject. 312 U.S. at 387-8

Maritime law has adopted the "interest test" in determining questions where there is a conflict-of-law with applicable local laws. *Hellenic Lines, Ltd. v. Rhoditis,* 398 U.S. 306, 90 S.Ct. 1731 (1970). Where a dispute is one of essentially local concern, local law should apply. *Pacific Merchant, supra,* 918 F.2d at 1424-6. This Court has held that where a carpenter on a vessel, but whose activities had no "direct relation to navigation or commerce", suffers an injury, the application of local law to his claim for relief was permissible. *Grant Smith-Porter Ship Co. v. Rohde,* 257 U.S. 469, 42 S.Ct. 157 (1922). This Court found local law would not "interfere with the proper harmony or uniformity of [maritime] law." This Court specifically noted the local flavor of the dispute and the lack of *direct* involvement in maritime commerce, the stuff of traditional maritime concern.

> the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential. 42 S.Ct. 157 at 158.

Here, plaintiff was an oil and gas meter technician involved in work on fixed offshore platforms governed by OCSLA. His work, and his worksite were not maritime. *Herb's Welding, Inc. v. Gray,* 470 U.S. 414, 105 S.Ct. 1421 (1985). The Court below has held that the parties expected to be governed by Louisiana law. In fact both parties chose to proceed herein through trial and initial appeal, solely under Louisiana law. (Appendix A, p. A-6).

The interests and activities involved do not involve traditional maritime commerce. The local interests are of more significance and local law should have been applied. This case is not significantly maritime to present any material impairment of uniformity.

CONCLUSION

This Court will refuse to accept jurisdiction in cases where the decision below is based on state law which does not involve *substantial* federal questions. Questions of non-prejudicial error, questions which are governed by clear precedent, and questions which have been correctly analyzed by the state court below are *not substantial.* The lower court's rejection of OCSLA as a source for the application of Louisiana law, if an error, was harmless and non-prejudicial. The lower court's use of a supplemental state remedy was based on clear precedent from this Court. The lower court's determination that 2317 is neither repugnant to maritime law nor an impairment to necessary uniformity was subjected to a correct analysis of federal law. The four (4) federal questions presented in this case are not substantial. Since the non-federal questions are not subject to review in this Court, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

KARL W. BENGTSON
Louisiana Bar #2942
SHELTON AND LEGENDRE
Post Office Drawer 52548
Lafayette, Louisiana 70505
(318) 233-7084
Attorneys for Plaintiff-Respondent, Michael J. Green.

June 19, 1992